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## THE ADMISSIBILITY OF X-RAY PHOTOGRAPHS IN EVIDENCE.

It has been charged against the law that it is too slow to embrace the results of scientific investigation and that it lags about a hundred years behind every other science. We have no inclination to take up the challenge thus thrown down, but would like to call attention to the fact that in one particular at least the general statement thus made is not the truth.

Photography in its present state is a comparatively recent achievement of science. And especially is this true of photographs taken by means of what is known as the X-ray, that ray of molecular motion so irresistible, that many opaque substances, hitherto indifferent to the influence of other light, have been compelled to yield up their secrets. No more wonderful victory over nature was ever achieved, nor one which seems so full of rich promise for the future. Possibly, for this reason, if not another, the courts so quickly acknowledged the results of science's achievement in this respect and permitted the introduction of X-ray photographs in evidence.

The recent case of City of Geneva v. Burnett, 91 N. W. Rep. 274, is the cause of attention being called to this interesting question. In that case the Supreme Court of Nebraska held generally that under proper precautions and with necessary explanations, what are known as "X-ray pictures" are admissible in evidence for the purpose of showing the condition of the internal tissues of the body. In this case some medical men testified that one of the consequences of the injury was, or might probably be, a calcareous deposit in the tissues of the foot, and that they had examined the foot of the plaintiff, who was a young person, by means of an apparatus for making or taking what are called "X-ray pictures" of it, which disclosed the presence of such a deposit, and that, in their opinion, the deposit was the result of the injury. In answer to the objection that these "pictures" were secondary evidence the court said: "From the testimony of the witnesses, we are convinced that no better evidence of the condition of the interior tissues of the foot could have been obtained, without a surgical operation, to which the plaintiff was not called upon to submit."

In our exhaustive examination of this question we find that the first court to enjoy the distinction of admitting this evidence was a district court in Colorado. The case is that of Smith v. Grant, 29 *Chicago Leg. News*, 145. In this case, X-ray photographs of certain bones of the body were admitted in evidence simply to aid experts in proving the relation of certain bones with one another. The court said: "Modern science has made it possible to look beneath the tissues of the human body and has aided surgery in telling of the hidden mysteries. We believe it to be our duty in this case to be the first to admit in evidence a process known and acknowledged as a determinate science."

The first authoritative case on this point, however, is that of Bruce v. Beall, 99 Tenn. 303, 41 S. W. Rep. 445. In this case the court admitted in evidence an X-ray photograph, showing the overlapping bones of one of the legs of plaintiff, broken by an injury, for which suit is brought. The photograph was taken by a physician and surgeon familiar with fractures and with the process of taking such photographs, who testified that it accurately represented the condition of the leg. The court said: "New as this process is, experiments made by scientific men have demonstrated its power to reveal to the natural eye the entire structure of the human body, and that its various parts can be photographed, as its exterior surface has been and now is. And no sound reason is assigned why a civil court should not avail itself of this invention, when it was apparent that it would serve to throw light on the matter in controversy." Further on, however, the court throws certain restrictions around the introduction of this kind of evidence. "It is not to be understood," say the court, "that every photograph taken by the cathode or X-ray process would be admissible. Its competency depends upon the science, skill, experience and intelligence of the party taking the picture and testifying with regard to it, and that, lacking these important qualifications, it should not be admitted. And, again,

that, even when properly admitted, it is not conclusive upon the triers of fact, but is to be weighed like other competent evidence.

The next case in point of time is from a *nisi prius* court in Ohio. Tish v. Welker, 7 Ohio N. P. 472, 5 S. & C. P. Dec. 725. This case is interesting because it gives a form for preparing a proper instruction on the introduction of such photographs. The instruction approved by the court was as follows: "There have been offered in evidence two photographic negatives, taken by the Roentgen or X-ray process of the plaintiff's injured femur bone. The negatives offered in evidence in this case represent the shape and size of the plaintiff's right femur bone, somewhat enlarged, at the time the negatives were taken, namely, Exhibit A, on October 24, 1896, and Exhibit B, on May 9, 1896. You are to take these negatives and consider them as approximately correct representations of the shape and size of the plaintiff's injured femur bone, at the time they were taken, and at the present time, for the purpose of aiding you in determining the extent of the plaintiff's injury, or in any other way in the consideration of the evidence in this case."

Possibly the clearest and fullest discussion of this question is to be found in the case of De Forge v. Railroad Co., 178 Mass. 59, 59 N. E. Rep. 669. This was an action to recover for personal injuries consisting of a fracture of the bones of plaintiff's left foot. The plaintiff put in evidence X-ray pictures of the plaintiff's feet printed from a single glass plate, on which the feet were designated in pencil as "left" and "right" respectively, on the assumption that the true left and right were reversed on the plate. The defendant then offered in evidence the glass plate from which the pictures were printed and offered to show that the X-ray process placed the right foot on the right side of the plate and the left foot on the left side of the plate, and that in printing from it the objects would be reversed; and that, as a matter of fact, the pictures showing an enlargement were pictures of the right foot instead of the left. This evidence was excluded. In reversing the case because of the trial court's error in excluding defendant's evidence, the court calls attention to the peculiar nature of an X-ray photograph. "It is entirely clear from the testimony," says Lathrop, J., speaking for the court, "that the picture on the glass plate was not taken by a lens but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object, the plate being below the feet and the light above them. When pictures were printed from the plate the position of the feet would be reversed. The plaintiff assumed from his marking on the pictures that the feet as represented *on the plate* were reversed." In answering the objection that in admitting photographs in evidence the trial court is said to have large discretion, the court said: "While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken."

Another interesting phase of this question, is presented by the case of Miller v. Dumon, 24 Wash. 648, 64 Pac. Rep. 804. In this case two objections were made, first to the admission of the X-ray negative itself, and, second, to any expression of opinion based thereon. The court overruled both objections. In regard to the first objection, Fullerton, J., speaking for the court, said: "Photographs taken by the common processes are generally held admissible as evidence, and there would seem to be no reason for making a distinction between an X-ray and a common photograph; that is, either is admissible as evidence when verified by proof that it is a true representation of the object which is the subject of inquiry." To the second and more interesting objection the court rejoined: "It is argued that the witness, instead of being permitted to express the opinion that the bone of the leg had been fractured, should have been confined to explaining what appearances upon the negative indicated a fracture, and leave it for the jury to determine from the negative whether these appearances were there or not. But counsel have overlooked the fact that the witness qualified as a surgeon, not only familiar with fractures, but with the X-ray process of determining whether a fracture had ever existed. As an expert, he was as much qualified to express his opinion from an examination made in this way as were the experts called by the appellant, who made their examinations by means more commonly used by

the medical profession. The method of examination did not affect the competency of his testimony."

It will be observed from this examination of the adjudged cases, how liberal has been the attitude of the courts to this new discovery of science, a discovery upon which science itself was very skeptical at its first announcement. Of course, the law must be conservative; it never can run ahead of the other sciences. But its prompt adoption of the wonderful and beneficent results of the X-ray photograph, together with its careful yet decisive answers to all possible objections to their admission in evidence, furnishes a subject of congratulation to the science of law and its administrators.

## NOTES OF IMPORTANT DECISIONS.

RAILROADS—LIABILITY FOR NEGLIGENCE RESULTING IN INJURY TO MERE LICENSEE UPON THE TRACK.—What is the duty of a railroad company to one who uses the track of the company without objection on their part,—in other words, to one who is a mere licensee? The question has been variously answered, but we think the weight of authority sustains the position taken by the court in the recent case of Cleveland, A. & C. Ry. Co. v. Workman, 64 N. E. Rep. 582. In that case an employee of a railroad company, whose duties in the performance of his employment did not require him to be on the main track of the railroad with a three-wheeled hand car, called a "speeder," went upon the main track without any invitation or inducement therefor by the company, but with no objection on the part of the company, and was injured. The trial court instructed the jury that it was not only the duty of the railroad to avoid injuring the plaintiff after it saw him on the track, but that it was necessary for them to especially look out for him. In holding this instruction defective, Davis, J., in speaking for the Supreme Court of Ohio, said:

"The trial court in this case, not without some warrant of authority, it must be admitted, took the view, and so instructed the jury, that it was the duty of the railroad company to exercise reasonable care not only to avoid injury to the deceased after it discovered him upon the track, but that it was its duty to keep a careful lookout to discover and avoid injury to any person who might happen to be on its track at that place and at that time, and that this duty was implied in the license to the deceased and his father. Such a conception of the law is opposed to reason, because a bare license must know that his license is subject to all the risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty toward him. Therefore the company owed him no duty of active vigilance to especially look out for and protect him. Railway Co. v. Aller, 64 Ohio St. 192, 60 N. E. Rep. 205; 3 Elliott, R. R. § 1250. It is believed that it is also contrary to the weight of authority. 3 Elliott, R. R. §§ 1250, 1251; 2 Thomp. Neg. (2d Ed.) §§ 1709, 1711, 1712, 1723, 1724; Railway Co. v. Vittitoe's Admr. (Ky.), 41 S. W. Rep. 269. It may be added here that the rule is substantially the same as to trespassers and mere licensees; that is, licensees without invitation or inducement. An employee who goes upon the track or elsewhere upon the company's premises, not in the line or discharge of his duty, and without any invitation, express or implied, is at most a mere licensee, to whom the company owes no duty to keep such place safe. 3 Elliott, R. R. § 1251, and case cited; *Id*, § 1303, and cases cited; Railway Co. v. Marsh, 63 Ohio St. 236, 58 N. E. Rep. 821, 52 L. R. A. 142; Baker v. Railway Co., 95 Iowa, 163, 63 N. W. Rep. 667; Railroad Co. v. McKnight, 16 Ill. App. 596; 1 Thomp. Neg. (2d Ed.) §§ 945, 946. The doctrine of Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. Rep. 451, 4 Am. St. Rep. 507, does not apply here, because there was in this case no pretense of acquiescence in the public use of the railway track in the way in which it was used by the deceased, nor was there any invitation or inducement held out to the deceased to so use it. There was at most only a failure to object to such user."

## FLIGHT — IN CRIMINAL AND CIVIL SUITS.

It has been remarked that there is no peculiarity of the constitution of human nature and the structure of the human mind, constantly confirmed by observation of criminal conduct, and even in culpable conduct, in daily life, more strongly marked than the tendency of delinquency and guilt to shun investigation and seek concealment. It seems to be an intuitive impulse which leads the perpetrator of a crime to destroy or otherwise get rid of evidence which would convict of the commission; and in those cases where it is impossible to conceal a crime by expedients of this description, the criminal seeks safety by concealing himself, and where no facilities for concealment are found, has recourse to actual *flight*.[1] One who thus flees is known as a fugitive from justice; that is, a person who, having committed a crime in one state, flees from the state in which it was committed to escape trial and punishment,[2] or withdraws

[1] Burrill on Circumstantial Evidence (2nd. Ed.) 469.
[2] 1 Bouvier Law Dict. (Rawle's Ed.) 857.

himself from its jurisdiction without awaiting to abide the consequences of his act.[3]

Flight, then, in criminal law, is the evading of the course of justice by voluntarily withdrawing from the jurisdiction of the courts of the state. An offender may flee by secreting himself, or by not being usually and publically known as being within the jurisdiction of the court.[4] But in order to flee a person must have been actually in the place from which he is said to have fled.[5]

From the earliest time in English jurisprudence,[6] to the present day,[7] in criminal trials, evidence of the *flight* of an accused person has been and is competent evidence against him, at first as establishing his guilt, and later as having a tendency to establish his guilt; but at this time it is to be regarded only as a circumstance to be taken into consideration by the jury in connection with other facts proven— it is no longer absolute evidence of guilt, as formerly.[8]

Our early English ancestors, with a rude and barbaric system of jurisprudence, conscious, perhaps, of their inability to weigh evidence with effect, or careless of the consequences of error, sometimes rejected the evidence altogether, and at others converted certain pieces of evidence into rules of law, by investing them with conclusive effect merely because of their probative force.[9] Thus, ob-

[3] *In re* Voyrhees, 32 N. J. L. (3 Vr.) 150.

[4] United States v. O'Brian, 3 Dill. C. C. 383.

[5] Jones v. Leonard, 50 Iowa, 108. See, United States v. White, 5 Cr. C. C. 44; United States v. Smith, 4 Day (Ct.) 125.

[6] See Foxley's Case, 5 Co. 109*b*; Dr. Foster's Case, 11 Co. 60*b*; Jenk. Cent. 1 Cas. 80; 4 Bl. Com. 387.

[7] Allen v. United States, 164 U. S. 492; bk. 41 L. Ed. 528; Hickory v. United States, 160 U. S. 508, 422; bk. 40 L. Ed. 474, 479.

[8] In the case of Hickory v. United States, 160 U. S. 408, 422; bk. 40 L. Ed. 474, 479, the question came up as to the weight to be given to *flight* as evidence of guilt, and the court charged the jury that "the law recognizes another proposition as true, and that is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom." This was held error, because it was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive that it was the duty of the jury to act on it as on axiomatic truth. In the case of Alberty v. United States, 162 U. S. 499, 509, bk. 40 L. Ed. 1051, 1056, the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that *flight* was a silent admission by the defendant that he was unwilling or unable to face the case, and was in some sense feeble or strong, as the case might be, a confession. This was held to be error.

[9] Best's Prin. Ev. (Chamberlain's ed.) 437. The defects in the system of trial in the seventeenth century, I own, strike me as being almost less important than the utter absence which the trials show of any conception of the true nature of judicial evidence on the part of judge, counsel and prisoner. 1. Stephen' Hist. Cr. L. Eng. (1st. ed.) 399. *Trial by ordeal, duel, etc.* —There are some early modes of getting at the truth in criminal cases which are novel and interesting for their utter lack of any conception of the elementary rules of evidence. The proceedings and mode of trial in criminal cases are a very remarkable part of the Anglo-Saxon jurisprudence. The prosecutor, or accuser, as he was called, made his charge which, it would seem, was sufficient alone to put the person accused on his defense. The defense and answer to this charge was this: If it was a matter of not great notoriety, but such as might admit of some doubt, the party purged himself by his oath, and the oaths of certain persons (called thence compurgators) vouching for his credit, and declaring the belief they had that he spoke the truth. If the compurgator agreed in a favorable declaration, this was held a complete acquital from the accusation. But if the party had been before accused of larceny or perjury; or had otherwise been rendered infamous and was thought not worthy of credit, he was driven to make out his innocence by an appeal to heaven, in the trial by ordeal. This was of several kinds. Two principals were by water and fire (or iron); by water, hot or cold, and by hot iron. The iron was of one, two or three pounds weight, and was, therefore, called simple, double or triple ordeal. The ordeal was considered a religious ceremony. The person, the water and the iron were accordingly prepared under the direction of the priest, by exercises and other formalities, and the whole conducted with great solemnity. For three days before the trial the culprit was to attend the priest, to be constant at mass, to make his offerings, and in the meantime to sustain himself on nothing but bread, salt, water, and onions. On the day of trial, he was to take the sacrament, and swear that he was not guilty of, or privy to, the crime imputed to him. The accusor and accused were to come to the place of trial, attended with not more than twelve persons each; the production of more than that number by the accused would have amounted to a conviction. The accuser was then to renew his charge upon oath, and the accused to proceed to make his purgation. If it was by hot water, he was to put his hand into it, or his whole arm, according to the degree of the offense charged; if it was by cold water his thumbs were tied to his toes, and in this posture he was thrown into it. If he escaped unhurt by the boiling water, which might easily be contrived by the art of the priests, or if he sunk in the cold water, he was declared innocent. If he was hurt by the boiling water, or floated in the cold, he was considered as guilty. If the trial was to be by the hot iron, his hand was first sprinkled with holy water; then taking the iron in his hand he walked nine feet. The method of taking his steps was peculiarly and curiously appointed. At the end of the stated distance he threw down the iron, and hastened to the altar; then his hand was bound up for three days, at the end of which time it was to be opened; and from the appearance of any hurt, he was declared guilty, if no appearance of hurt he was declared innocent. An-

serving that guilty persons commonly, or at least frequently, *fled* from justice, they adopted the hasty conclusion that it was only the guilty who did so, and "*fatetur facinus qui fugit judicium*,"[10] became a maxim of the common law. By the early common law where one accused of treason, felony, or even of petit larceny, whether convicted or acquitted, was found by the jury to have *fled*, his goods and chattels were forfeited.[11] This notion was not peculiar to the early English law, but is found also among the earlier civilians.[12] In England the practice was formally abolished during the reign of George IV.,[13] but had fallen into desuetude prior to that time.[14]

It is to be remarked in passing that the maxim of the old common law was both unwarranted and misleading; it resolves appearances into actualities; from particular instances it draws universal conclusions. The maxim is about as reliable as a rule of evidence and guide to the truth as the old superstition asserting that, should a murderer touch the dead body of his victim, the life blood would flow.

It has been observed that most persons guilty of the commission of a serious crime are alarmed and confused in view of discovery. Even in those cases where, apparently, the most effectual precautions for concealment have been taken, the idea of discovery, with the legal consequences of the crime, the loss of character, liberty, and perhaps of life itself, may be said to hound the mind, and the fear of discovery not unfrequently to agitate it, in spite of all determination to assume an exterior of calmness and indifference. But persons guilty of the most atrocious crimes do not always become nervous or betray emotions in view of discovery. A noteworthy instance is found in the man Holmes, of Chicago, convicted at Philadelphia, of a most atrocious and systematic murder of children and women for the insurance money. It is equally true that persons guilty of the most heinous crimes do not always fly.[15] And the fact that the accused did not fly when he had an opportunity to do so, we find sometimes made use of in arguments before a jury as proof of innocence.[16] But this reasoning is

other method of applying this ordeal by hot iron, was by placing red-hot plough-shares at certain distances, and requiring the delinquent to walk over them; which if he did unhurt, it was declared proof of his innocence, and he was acquitted Leg. Athelst. 23; I Reeves' Hist. Eng. Law (2 ed.) 20-1. Ordeal by duel was established by the laws of William the Conqueror. By these laws the same liberty is given to an Englishman, which every Frenchman had in his own country, to accuse or appeal a Frenchman, by duel, of theft, homicide, or any other crime, which before that time used to be tried by ordeal. If an Englishman declined the duel, then the Frenchman was at liberty to purge himself by the oaths of witnesses, according to the law of Normandy. On the other hand, if a Frenchman appealed an Englishman by duel, the Englishman was to be allowed his election, either to defend himself by duel or by ordeal, or even by witnesses; and if either of them were infirm, and could not or would not maintain the combat himself, he might appoint a champion. In case of outlawry, an Englishman could purge himself by ordeal; but a Frenchman appealed by an Englishman in such a case, should make out his innocence by duel. However, if the Englishman should be afraid *non audeat*, to stand trial by duel, the Frenchman should purge himself *pleno juramento*, that is, by oaths of compurgators. Leg. Conq. 55, 69; 70; I Reeves' Hist. Eng. L. (2d ed.) 33-4. Statutes of Clarendon provided that any one charged with the crime of murder, theft, robbery, or receipt of such offenders, or with forgery, malicious burning, should submit to the ordeal by water; and if he failed in the experiment, he should lose one foot, and (it was added afterwards at Northampton) should abjure the realm, and leave it within forty days; if acquitted he should find pledges to answer for him, or abjure the realm. If accused of murder or other heinous crime, although acquitted, he must leave the kingdom within forty days, and carry all his goods with him. Wilk. Leg. Ang. Sax. p. 304. Trials by ordeal continued until the judgment of councils and the interference of the clergy prevailed against it in the third year of the reign of Henry III. See, Dec. pars. 2, caus 2, quest 5, cap. 20; Dugd. Ori. Jur. 87.

[10] He confesses his guilt who flees from trial.

[11] 4 Bl. Com. 387.

[12] Who lay down the rule, "*Reus per fugam sui, pene accusator existit.*" Voet. ad Paud lib. 22, tit. 3, No. 5; Novel 53, cap. 4. Among the modern civilians more correct views prevail. See, Mascard. de Prob. Concel. 499; Malth. de Prob. cap. 2, No. 69.

[13] By 7&8 George IV., c. 28, §5, it is enacted "that where any person shall be indicted for treason or felony, the jury impanneled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he *fled* from such treason or felony."

[14] Staundt. P. C. 183b.

[15] In the case of State v. Cicely, 13 Smed & M. (Miss.) 208, 218, the accused not only did not fly, but went the same night and gave information to a neighbor as of murder committed by another person.

[16] This doctrine was denied, and evidence of the fact held inadmissible, in the case of People v. Rathbun, 21 Wend. (N. Y.) 509, 520. The court say: "It was offered to show that the prisoner, although advised by his assignee to escape and go beyond the reach of process, and having an opportunity to do so, declined; and it is supposed that the admissibility of such proof, follows from the rule that turns an attempt to escape against the prisoner. A strong declaration of Hume,

equally at fault with the old English maxim.

In modern and enlightened jurisprudence the fact of *flight* is reduced to its true place in the administration of criminal law, namely, to that of a mere circumstance to be taken into consideration by the jury, in connection with other evidence,[17] a fact which it is always important to show, and which, when combined with others, may supply the most satisfactory proof of guilt, but which, in and of itself, proves nothing.[18] It is absurd and dangerous to invest it with infallibility. The old biblical doctrine that "the wicked flee when no man pursueth, but the innocent are as bold as a lion," has been repudiated by our conrts,[19] and justly so, because the sum of human experience has shown us that neither doctrine of the antithetical precept can be safely relied upon in the administration of our criminal law.

We have already seen that where a person, threatened with arrest, flees from the state, this is a provable circumstance to be considered by the jury, in connection with other evidence establishing the *corpus* of the crime charged, in determining the guilt of the party on trial,[20] unless it is shown that the *flight* was from other causes than from a sense of guilt, or is otherwise explained.[21] But *flight*

in his treatise on the Trial of Crimes, that such a fact should be received as conclusive against any case sustained by circumstantial evidence merely, was cited. But the difference between an attempt to escape, and refusal to escape, whatever degree of moral conviction the latter may carry to the mind of the writer, is quite obvious when they are offered as legal evidence. The attempt implies guilt, and operates against the party like a confession. The refusal is an act and confession in his own favor. Once receive it, and the criminal courts will be loaded with such evidence. It is almost as easily manufactured as a declaration of innocence. The prisoner and his friends may introduce a third person to give the evidence and hear the refusal, who may be a witness with perfect integrity. A dupe himself, he may testify to the fact without being guilty of perjury; and thus the practical working of Mr. Hume's rule would, in effect, neutralize the force of all circumstantial evidence—a species of evidence which is, in general, the only resort for the establishment of infamous offenses, and, when received under proper caution, is at least equally satisfactory with the most positive proof. The ease with which an *alibi* is said to be gotten np and maintained by perjury, renders it a very suspicious kind of proof. So the art with which insanity may be counterfeited. But the false declaration of innocence, or subsequent acts which seem to indicate it, are too common a resort to be regarded as even admissible."

[17] Elmore v. State, 98 Ala. 12; 13 South. Rep. 427; Murrell v. State, 46 Ala. 89; 7 Am. St. Rep. 592; Burris v. State, 38 Ark. 221; People v. Sheldon, 68 Cal. 434; 9 Pac. Rep. 457; People v. Wong Ah Ngow, 54 Cal. 151; People v. Stanley, 47 Cal. 113; 17 Am. St. Rep. 401; Sewell v. State, 76 Ga. 836; McRea v. State, 71 Ga. 96; Revel v. State, 26 Ga. 275; Whaley v. State, 11 Ga. 123; Anderson v. State, 104 Ind. 467; 4 N. E. Rep. 63; Hittner v. State, 19 Ind. 48; State v. Stevens, 67 Iowa 557; 25 N. W. Rep. 777; State v. Fitzgerald, 63 Iowa 268; 19 N. W. Rep. 202; State v. Rodman, 62 Iowa 456; 17 N. W. Rep. 663; Clark v. Commonwealth, (Ky.), 32 S. W. Rep. 131; Ryan v. Commonwealth (Ky.), 5 Ky. L. Rep. 177; State v. Hobgood, 46 La. Ann. 855; 15 South. Rep. 406; State v. Melton, 37 La. Ann. 71; State v. Dufaur, 31 La. Ann. 804; State v. Beatty, 30 La. Ann. 1266; State v. Williams, 30 La. Ann. 824; Commonwealth v. Brigham, 147 Mass. 414; 18 N. E. Rep. 167; People v. Cleveland, 107 Mich. 367; 65 N. W. Rep. 216; State v. Howell, 117 Mo. 307; 23 S. W. Rep. 263; State v. Jackson, 95 Mo. 623; 8 S. W. Rep. 749; State v. Rush, 95 Mo. 199; 8 S. W. Rep. 221; Fanning v. State, 14 Mo. 386; State v. Palmer, 65 N. H. 216; 20 Atl. Rep. 6; People v. Petinecky, 2 N. Y. Cr. Rep. 450; People v. McKeon, 64 Hun (N. Y.) 504; 19 N. Y. Supp. 486; People v. Myers, 2 Hun (N. Y.) 6; People v. Rathbun, 21 Wend. (N. Y.) 509, 520; Benavides v. State, 31 Tex. 579; Blake v. State, 3 Tex. App. 581; Dean v. Commonwealth, 4 Gratt. (Va.) 541; State v. Koontz, 31 W. Va. 127; 5 S. E. Rep. 328; Ryan v. State, 83 Wis. 486; 53 N. W. Rep. 836; United States v. Barlow 1 Cr. C. C. 94; Fed. Cas. No. 14, 521.

[18] See authorities in foot-note numbered 16 and 17.

[19] See Hickory v. United States, 160 U. S. 408, 422; bk. 40 L. Ed. 474, 479; Alberty v. United States, 162 U. S. 499, 509; bk. 40 L. Ed. 1051, 1056.

[20] See ante-note numbered 17.

[21] Sewell v. State, 76 Ga. 836; State v. Beatty, 30 La. Ann. 1266; State v. Williams, 30 La. Ann. 824. See Thomas v. State, 100 Ala. 53, 14 South. Rep. 621; Campbell v. State, 23 Ala. 44; People v. Cleveland, 107 Mich. 367, 65 N. W. Rep. 266; State v. Jackson, 95 Mo. 623, 8 S. W. Rep. 749; State v. Hart, 66 Mo. 208; Dean v. Commonwealth, 4 Gratt, (Va.) 541. In those cases where one charged with a crime escapes, and subsequently voluntarily surrenders himself, evidence of such voluntary surrender cannot be given to remove the inference of guilt raised by the flight. People v. Cleveland, 107 Mich. 367, 65 N. W. Rep. 216. Evidence of an attempt to escape from prosecution on a subsequently returned indictment found in another county, is inadmissible. State v. Hart, 66 Mo. 208. But an attempt to escape jail to evade prosecution on another indictment is a provable fact against the accused where both indictments are founded on the same fact or offense. Dean v. Commonwealth, 4 Gratt. (Va.) 541. In a prosecution for murder, the prisoner's statement that he had assisted a fellow prisoner to escape, as an inducement to the latter's father to help him to escape, is provable as a circumstance tending to establish the prisoner's guilt. Campbell v. State, 23 Ala. 44. On a trial for larceny committed two years before, it was held that on the defendant's arrest therefor, his declaration that he had been working two years in a foreign state, is provable as tending to establish flight. Thomas v. State, 100 Ala. 53; 14 South. Rep. 621. On the trial of one accused of murder, it has been held competent to prove that the accused admitted to a fellow prisoner that he attempted to break jail in another state, on learning he was to be brought back and tried for the murder being investigated. State v. Jackson, 95 Mo. 623; 8 S. W. Rep. 749.

is not necessarily an admission of guilt,[22] and raises no legal presumption against the accused; it is merely a circumstance to be considered by the jury in connection with evidence of the *corpus* of the crime.[23] So also is the possession of tools for effecting an escape an incriminating circumstance which may go to the jury;[24] and the same is true of an attempt to bribe a guard in order to effect an escape;[25] but neither, in and of itself, is sufficient to warrant conviction.[26] All that can be said, or rather the most that can be said, is that *flight*, or the other circumstances mentioned, are not substantive evidence, but merely circumstances to be considered by the jury as tending in some degree to prove a consciousness of guilt, and entitled to more or less weight, according to the circumstances of the particular case. But this rule extends only to the person fleeing, or otherwise offending in the manner indicated, and cannot be extended to a case where a conspiracy to commit a crime has been entered into between two or more, and the *flight* of a co-conspirator is sought to be proved against another on their separate trial.[27]

Whatever presumption is raised by *flight*, or the other circumstances alluded to, may be explained or rebutted. To rebut the presumption of guilt arising from *flight* or concealment, or the like, of one charged with a crime, evidence is admissible to show that such *flight* or concealment was caused by apprehension of violence,[28] for the motive prompting *flight* or concealment is always provable by the accused.[29] Thus, the fact that others advised the accused to fly may be shown;[30] so also may public excitement threatening violence, but this must exist before the *flight* or concealment;[31] and absence, which is the result of insanity, rebuts the presumption.[32] But a mere danger to the health of the accused, liable to result from the unsanitary condition of the jail, will not be sufficient to rebut the presumption raised against the accused.[33]

These well-recognized rules in relation to *flight* or concealment do not obtain in civil cases,—indeed, it is not certain that the fact of *flight* or concealment is ever admissible in evidence in a civil suit outside of proceedings under a statute where the fact of *flight* or concealment gives the right of action. The question has been but little discussed by our courts, and where discussed has not been squarely decided. It is the opinion of the writer that evidence of *flight* is in no case provable in a civil suit, but may be in a proceeding specially provided for by statute, based on the fact of flight, concealment, or the like; such as attachment or garnishment proceedings, where the party has left the state.

Thus it has been held that the commission of a crime and flight for the purpose of escaping punishment, is not a provable circumstance in an action for divorce.[34] The same is true in an action to recover damages for breach of promise of marriage and seduction. Thus in the recent case of Wise v. Schloesser,[35] where such an action was brought, and on the trial the plaintiff was permitted to offer evidence tending to show *flight* of the defendant after he was accused of the wrong. On ap-

[22] Matthews v. State, 19 Neb. 330; 27 N. W. Rep. 234.

[23] People v. Wong Ah Ngow, 54 Cal. 167.

[24] Clark v. Commonwealth, 32 S. W. Rep. 131; State v. Duncan, 116 Mo. 288; 22 S. W. Rep. 699.

[25] McKea v. State, 71 Ga. 96; Whaley v. State, 11 Ga. 123; Dean v. Commonwealth, 4 Gratt. (Va.) 541.

[26] Murrell v. State, 46 Ala. 89; 7 Am. Rep. 592; Waybright v. State, 56 Ind. 122; Webb. v. Commonwealth, (Ky.), 4 Ky. L. Rep. 436; State v. Ah Kung, 17 Neb. 361; 30 Pac. Rep. 995. Evidence of an attempt to escape from jail, or flight, or concealment is improper where there is no other evidence tending to establish guilt. Webb v. Commonwealth (Ky.), 4 Ky. L. Rep. 436.

[27] People v. Stanley, 48 Cal. 277; Mullins v. Commonwealth (Ky.), 3 Ky. L. Rep. 686; People v. Sharp, 107 N. Y. 427, 14 N. E. Rep. 319, 1 Am. St. Rep. 581; Jump v. State, 27 Tex. App. 459, 11 S. W. Rep. 461; Holtz v. State, 76 Wis. 99, 44 N. W. Rep. 1107.

[28] Golden v. State, 25 Ga. 527; State v. McDevitt, 69 Iowa, 549, 29 N. W. Rep. 459; Kennedy v. Commonwealth, 77 Ky. (14 Bush) 340; Plummer v. Commonwealth, 64 Ky. (1 Bush.) 76; State v. Chevallier, 36 La. Ann. 81; State v. Barham, 82 Mo. 67; State v. Phillips, 24 Mo. 475; Arnold v. State, 9 Tex. App. 435; Lewallen v. State, 33 Tex. Cr. Rep. 412, 26 S. W. Rep. 832.

[29] Webb v. Commonwealth, (Ky.) 4 Ky. L. Rep. 436; State v. Mallon, 75 Mo. 355; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; Lawellen v. State, 33 Tex. Cr. Rep. 412, 26 S. W. Rep. 832.

[30] State v. Phillips, 24 Mo. 475.

[31] *Id.*

[32] Peacock v. State, 50 N. J. L. (21 Vr.) 653; 14 Atl. Rep. 893.

[33] Kennedy v. Commonwealth, 77 Ky. (14 Bush.) 340.

[34] In the case of Lucas v. Lucas, 2 Tex. 112, a wife petitioned for a divorce *vinculo matrimoni*, alleging that her husband had committed theft and had run away to escape punishment; the court held that this was not an "outrage" within the meaning of Acts 1841, § 3, and that evidence of the theft and flight was not admissible.

[35] 111 Iowa, 16.

peal, claim was made that the evidence of *flight* is not admissible in a civil case, and that, if admissible, the evidence introduced as to *flight* was too remote from the principal transaction. The court say: "At the time defendant in that case (plaintiff in this) is said to have left the country, no suit had been commenced against him, nor had any threat been made that an action would be brought against him either for breach of promise or for seduction. Whatever may be the rule regarding the admission of such evidence in actions for seduction, we are of opinion that such evidence is inadmissible when the gist of the action is a breach of promise or contract. Moreover, the evidence shows that as soon as the plaintiff learned of the commencement of the main suit, he returned to the county of his residence, and appeared at the trial. We are not holding that evidence of flight is admissible in a civil case. On that point we express no opinion."

In the case of Hopkins v. Mathias,[36] suit was brought to recover damages sustained by the plaintiff because of her seduction by the defendant. At the trial there was evidence tending to prove that the defendant had conveyed a portion of his property to his daughter, and left the state. This evidence was objected to, but the objection was overruled. The appellee contended that the evidence was admissible as tending to show guilt, and the court instructed the jury that if they found that as soon as the defendant learned that he was accused of seducing the plaintiff, he changed his plans, disposed of his property at a sacrifice, and hastily left the state, such facts were proper to be considered by the jury in determining the question of the defendant's alleged guilt. The supreme court, in passing on this question, says: "That such is the rule in criminal cases will be conceded, but our attention has not been called to any authority which holds that such is the rule in civil cases. In criminal actions, the hasty flight upon being accused of a crime is admissible, we apprehend, on the ground that it tends to show that the accused is thereby seeking to escape prosecution and punishment for the crime. In such actions he can only be tried in the county and state where the crime was committed, and he cannot be tried there until he has been arrested, and ordinarily his personal presence is required at the trial. Not so in civil actions. They may be tried in the absence of the defendant from the state, if property has been attached, and such was the fact in this action. Ordinarily, civil actions are transitory, and may be brought in any state where the defendant may be found. We merely allude to these differences between civil and criminal actions, without determining whether the same rule should prevail in both, for the reason that it is deemed unnecessary to do so. "The rule in criminal actions, we believe, is, that the flight must be immediateiy after the accusation is made. It need not be instantly, but soon afterwards, so that it can be said that the flight was caused by the accusation. As we understand the record, Roswell Hopkins testified that he married the plaintiff on the seventh day of August, 1882, and that about three months thereafter he charged the defendant with being the father of her unborn child. This is the only evidence we are able to find which tends to show that the defendant was charged with the seduction of the plaintiff. It is true, there were rumors in the neighborhood possibly to that effect; but there is no evidence tending to show that he had knowledge of such rumors, unless it should be so inferred, because, in the opinion of one or more of the witnesses, his appearance and looks were suspicious; that is to say, he seemed to such witness to be nervous and apprehensive. But we think, the evidence, in the absence of evidence showing that the defendant had knowledge that he was charged with seducing the plaintiff, was inadmissible. Conceding that he was so charged by Hopkins, the charge was made some six weeks prior to the supposed flight of the defendant. This, it seems to us, is too remote, and therefore the court erred in the instruction on this subject given to the jury."

It is thought that in cases founded on contract, or sounding in tort, in the absence of a special statute regulating, evidence of *flight* or concealment is inadmissible as a circumstance to go to the jury as tending in any way to establish the cause of the plaintiff.

M. E. E. Kerr.

[36] 66 Iowa, 333.

## BREACH OF MARRIAGE PROMISE—DISEASE AS AN EXCUSE FOR CONSUMMATING MARRIAGE CONTRACT.

### SMITH v. COMPTON.

*Court of Errors and Appeals of New Jersey, June 16, 1902.*

Nothing will excuse the defendant for the breach of promise of marriage, except such a disease or complication of diseases as renders the making of the marriage contract, and the consummation of the marriage by marital intercourse, impossible.

VAN SYCKEL, J.: The writ of error in this case is brought to review a judgment of $7,500 recovered by the plaintiff for breach of a contract of marriage. The contract was not denied. The alleged infirmity in the proceedings below is based upon exceptions to the charge of the trial court, and to the admission of evidence offered by the plaintiff. The exceptions will be considered in the order in which they have been presented by the counsel of the defendant.

The defendant pleaded the general issue, and gave notice in writing to the plaintiff, under section 116 of the practice act (2 Gen. St., p. 2552), that he would interpose the following defenses under his plea of general issue: "(1) The defendant will deny the making of the contract mentioned in the declaration filed in this cause. (2) If it shall be established that the said defendant made the contract mentioned in the declaration herein, the said defendant will insist that subsequently thereto said defendant discovered that the said plaintiff was not a proper person for him to marry, on account of her character, and thereupon said defendant rescinded said contract. (3) If it shall be established that said defendant made the contract mentioned in the declaration herein, the said defendant will insist that subsequently thereto the said defendant became physically ill and infirm, whereby he was rendered incapable, without imminent hazard to his life, to execute or consummate said alleged contract."

The court refused the defendant's request to charge the jury that, if after the making of the promise to marry the plaintiff, but before the day named for the consummation of the marriage, the defendant, without his fault, contracted or developed a urinary or other disease which kept him under the treatment of a physician, and which would be aggravated by sexual intercourse, and hazardous to his health, such malady was a complete defense to the plaintiff's action for breach of promise. The charge of the court was "that nothing will excuse the defendant for the breach of his promise, except such a disease or complication of diseases as renders the making of the marriage contract, and the consummation of the marriage by marital intercourse, impossible. For instance, a man may upon the day fixed for his wedding be stretched upon his bed in the delirium of fever. Under such circumstances it will be no breach of his contract if he failed to perform it on that day. So he might, conceivably, without fault on his part, be in such a physical state that, while able to go through a marriage ceremony, it might be impossible for him to consummate the marriage by marital intercourse. Where such an impossibility exists, there would be a good defense to an action for failure to perform upon the day fixed; and if the impossibility of going through the marriage ceremony became permanent, as in a case of incurable insanity, or the impossibility of consummating the marriage became permanent, as in a case of incurable impotency, there would be a valid defense to any action whatever for breach of promise. Such an impossibility is not alleged or proved in this case. The extent to which the evidence for the defense goes is that the consummation of the marriage would be attended with imminent hazard to the defendant's life. However unfortunate that may be for the defendant, assuming it to be true, it is no defense to this action. The defendant has made the contract. He has failed to perform it. He must pay the damages for that failure. Contracts the performance of which involves imminent hazard to life are not infrequent. No one would think of excusing a locomotive engineer or the captain of a ship from the performance of his duty because of an unexpected danger to his life in the performance."

It is undeniably the general rule that if a party enter into an absolute contract, without any qualification or exception, he must abide by the contract, and either do the act or pay the damages. Rosenbaum v. Credit System Co., 64 N. J. Law, 34, 44 Atl. Rep. 966. In Superintendent, etc., v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373, Mr. Justice Whelpley says: "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract." This question is elaborately discussed in the opinion of Mr. Justice Depue in the recent case in this court of Middlesex Water Co. v. Knappmann-Whiting Co., 64 N. J. Law, 240, 45 Atl. Rep. 692, and the general rule is declared to be, in accordance with the cases of Paradine v. Jane, Aleyn. 26, and Superintendent, etc., v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373, "that, where the contract is express to do a thing not unlawful, the contractor must perform it, and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen." This firmly settled rule must be applied to contracts of marriage, unless it can be shown that such engagements are exceptions to the general rule. This question has been the subject of much discussion in the courts of different jurisdictions, which has resulted in great diversity of opinion. In Shackleford v. Hamilton (Ky.), 19 S. W. Rep. 5, 15 L. R.

A. 531,40 Am. St. Rep. 166, and in Allen v. Baker, 86 N. Car. 91, 40 Am. Rep. 444, the defendant successfully set up in bar of an action for breach of promise to marry that he was afflicted with a venereal disease which rendered him unfit for the married state, without disclaiming any fault on his own part. To those cases I am unwilling to give my assent, as I conceive that such a defense is excluded by the well-settled rule that no one can claim to be absolved from the performance of his obligation by reason of his own immoral conduct of his own turpitude, where the other party has not participated in it. Where both parties are in complicity in an illegal act or an act of turpitude, the court will not listen to a controversy between them founded upon it, but will leave them in the position in which they have placed themselves. Where a party offers to set up in his own defense his own immoral conduct, the court will not permit it. In my judgment, it would be more in accordance with correct legal principle to hold that the plaintiff would be entitled to refuse to marry him, and treat his condition as a breach of his contract. The cases which hold that the defendant's physical condition in cases of insanity or incurable impotency can be successfully interposed as a bar have no relation to this controversy. No such condition was in evidence, and, if it had been, the charge of the court recognized it as a good defense. The case of Sanders v. Coleman (Va.), 34 S. E. Rep. 621, 47 L. R. A. 581, is more liberal to the defendant, and lays down the rule that where the defendant, after the promise, contracts or develops a disease, without fault on his part, which renders it unsafe and dangerous to his health or life to perform his contract, it will constitute a defense to an action against him. On the contrary, Hall v. Wright, 96 E. C. L. 746, maintains that such physical defects cannot be set up in bar to the action.

In the case under consideration the declaration alleges that the promise made was to marry on the 15th day of June, 1900, and both the plaintiff and defendant admit that such was the promise. It was incumbent on the plaintiff to prove not only the promise, but also the breach, to support the action. The promise being admitted, and the refusal to perform at the stipulated time being also admitted, the plaintiff clearly established her right of action. In the case of Hall v. Wright, the promise counted upon being to marry within a reasonable time, it might with some plausibility be argued that the defendant's physical condition might be considered in determining whether a reasonable time had elapsed, and, if it had not, there would be no breach proven, and the right of action would not exist. Some of the judges commented upon that feature of the case, which is not present here.

Whether the defendant was entitled to have the damages mitigated upon that evidence which was admitted by the trial court is a different question. The contract was entered into, and there was a breach of it; and the only question is whether, as the court below charged, the plaintiff was entitled to some damages. This is not a duty or a charge created by law, which the party is disabled to perform without any fault on his own part, but a contract entered into by himself, in which he might have provided against the contingency which he alleges has occurred. The contract is an unconditional one, into which the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in Hall v. Wright that it is not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill-health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed. In this respect there was no error in the charge of the trial court.

There was no legal error in the trial below, and judgment should therefore be affirmed.

NOTE: *What Defenses Exist to an Action for Breach of Promise to Marry.*—The action for breach of a promise to marry has quite often been the object of severe criticism on the ground that there is in reality no reason or basis for the action at all. The argument is that all marriage is founded in love and the desire to procreate children; that marriage is a *status* rather than a contract, and that, therefore, the element of contract is of small importance. Another argument is that since love and the desire for legitimate sexual intercourse are the main inducements to a marriage, the absence of love on the part of one or the other of the parties, or the impairment of sexual ability in either of them, must necessarily be considered a sufficient excuse for the breaking off of an engagement to marry. These general considerations we heartily indorse and to them we would add another, that there is or should be in every marriage contract an entire absence of any financial inducement and that therefore it would be *contra bonos mores* to force upon one of the parties who desires to break the engagement, the alternative of marriage or the payment of damages based solely upon the pecuniary loss of the other. We shall notice in detail, however, what defenses the courts have permitted in actions of this character.

*Character of Plaintiff as a Defense.*—It may be stated as a general rule that if a man has been paying his addresses to one whom he supposes a modest person, and afterwards discovers her to be loose and immodest, he is justified in breaking any promise of marriage he may have made with her. La Porte v.

Wallace, 89 Ill. App. 517; Espy v. Jones, 37 Ala. 379; Goodall v. Thurman, 38 Tenn. 208; Burnett v. Simpkins, 24 Ill. 264; Berry v. Bakeman, 44 Me. 164; Gaskill v. Dixon, 3 N. Car., 536; Van Storch v. Griffin, 77 Pa. St. 504; Markham v. Herrick, 82 Mo. App. 327; Foster v. Hanchett, 68 Vt. 319, 35 Atl. Rep. 316; Beach v. Merrick, 1 C. & K. 463, 47 E. C. L. 463; Doubet v. Kirkman, 15 Ill. App. 622; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Guptill v. Verback, 58 Iowa, 98; Stratton v. Dole, 45 Neb. 572; Willard v. Stone, 7 Cow. (N. Y.), 22; Kelley v. Highfield, 15 Oreg. 277. It is important, however, to entitle a defendant to a verdict on this ground that the jury be satisfied, first, that the plaintiff was a loose and immodest woman; second, that defendant broke his promise on that account; and third, that he did not know her character at the time of the promise. Espy v. Jones, 37 Ala. 379; Butler v. Eschleman, 18 Ill. 44; Denslow v. Horn, 16 Iowa, 476; Snowman v. Wardwell, 32 Me. 275; Rich v. Mayers, 7 N. Y. Supp. 69. Thus, it has been held that the fact that plaintiff had committed fornication with other men is no defense, if, at the time of making the contract, the defendant had knowledge of it; nor if the contract, though made before such knowledge, was continued by him, as a subsisting contract, after such knowledge. Snowman v. Wardwell, 32 Me. 275. The case of Sprague v. Craig, 51 Ill. 288, shows the distinction between unchastity prior and subsequent to the engagement. In that case it was held that when a party enters into an engagement to marry with a knowledge that the other party was unchaste, he will be deemed to have waived the objection and cannot afterward set it up as a reason for his refusal to comply with his promise. But if either party shall be guilty of acts of unchastity subsequent to the engagement, the other party is absolved from the contract, whether such subsequent acts be known to the latter or not. But mere acts of familiarity with other men will not justify the defendant in breaking off the engagement. Thus, it has been held that the fact that plaintiff was on terms of familiar acquaintance or intimacy with other men would not be a defense unless her virtue, good name or chastity were impugned. McCarty v. Coffin, 157 Mass. 478; Robinson v. Craver, 88 Iowa 382.

*Physical Disability of Either Party as a Defense.*—Much foolish controversy, it would seem to the writer, has existed as to this particular phase of the question. If either of the parties to an engagement to marry discover that one or the other of them is afflicted with a disease which would render sexual intercouse between them dangerous either to themselves or their offspring, is not either of them justified in breaking off the engagement? It would seem that common sense, good morals and the welfare of society would demand an affirmative reply. Many courts, however, have held with the principal case that the parties to an engagement, who forget to put conditions to their promises (as if persons in love ever put conditions to any of their statements) they will be bound to endure all the dangers and agonies of sexual intercourse under circumstances such as we have mentioned or else suffer enormous financial loss. The leading case, under the influence of which these authorities have been lead astray, was that of Hall v. Wright, 96 E. C. L. 746. In that case defendant after his engagement became afflicted with severe bleeding from the lungs whereby he was rendered incapable of marrying without great danger to his life, which fact led him to break off the engagement. The young lady, however, would not release him and the English court held him liable for breach of his promise to marry her. It is gratifying to note, however, that many American authorities have distinctly controverted the reasoning of this case. Thus, in Allen v. Baker, 86 N. C. 96, 41 Am. Rep. 444, the court said of this decision: "In making that decision, the court treated a contract for marriage as they would any other contract, saying that, though in bad health, the man might nevertheless so far perform his contract as to marry the woman and endow her with a wife's interest in his estate; and if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal service, which, if not capable of being wholly performed, may be partially so; and in the next place, we believe it to be contrary to the understanding of men generally that the acquisition of property or social position either does or should constitute a main and independent motive and inducement for entering into such a contract. The usual and legitimate objects sought to be attained by such agreements to marry are, the comfort of association; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise." We believe that the weight of authority sustains this view. Gardner v. Arnett (Ky.), 50 S. W. Rep. 840; Kantzler v. Grant, 2 Ill. App. 236; Saunders v. Coleman, 97 Va. 690, 34 S. E. Rep. 621; Goddard v. Westcott, 82 Mich. 180, 46 N. W. Rep. 242; Shakleford v. Hamilton, 93 Ky. 80, 19 S. W. Rep. 5; Gulick v. Gulick, 41 N. J. Law, 13; Gring v. Lerch, 112 Pa. St. 244, 3 Atl. Rep. 841; Mabin v. Webster, 129 Ind. 430, 28 N. E. Rep. 863. In the case of venereal diseases it has been held that the defendant would be answerable in damages if the disease was contracted subsequently to the time of making the promise, or if before and he knew his infirmity was incurable; but if it were contracted prior to the promise, and he had reason to believe it was temporary only, he would be excusable. Allen v. Baker, 86 N. C. 97. The only objection we have to this proposition is that its conditions are rather unjust and one sided. It is settled that one party to an engagement cannot compel the other party to celebrate the marriage, if he or she is suffering from a venereal disease, Kantzler v. Grant, 2 Ill. App. 236. Why, therefore, should the defendant with a venereal disease be compelled to marry the plaintiff when he could not have the same remedy against the plaintiff. And, moreover, it is absolutely against public policy for such persons to marry at all, no matter when or how the disease originated. If it is merely desired to punish the defendant, it would seem more expedient to provide an action in which the alternative of marriage would not be offered to the guilty defendant. A suggestion in this regard is made by the court in the recent case of Trammell v. Vaughn, 158 Mo. 214, 59 S. W. Rep. 79, 51 L. R. A. 854, where the court said: "Of course, if the defendant entered into the contract knowing of such an impediment to its consummation, it would be an aggravation of the plaintiff's damages, and she would be entitled to refuse to marry him and to treat his condition as a breach of the contract,—a fraud perpetrated upon her." This was a case in which the defendant pleaded that *subsequent* to his engagement he was attacked by a

venereal disease. In answer to the suggestion in Hall v. Wright, that the marriage should be formally celebrated, the court said: "The idea that the ceremony should be performed, and the consummation of the marriage postponed until he is cured, is not only intolerable, but obnoxious to a proper subservience of the public interests and morals. This, too, whether the woman knows his condition or not; for, though she be willing to waive the defect, or be indifferent to the condition or its consequences to her and her children, the third party to the contract, the state, has the right to and does object. If the disease is of a temporary character, the defendant is entitled to postpone the marriage until he is cured; and if the disease is of a permanent character, the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so."

Other diseases besides those of a venereal nature have been held to justify a breach of a marriage promise. Thus the fact that the defendant is incurably impotent is always a defense. Gulick v. Gulick, 41 N. J. Law 13. So also, *vice versa*, the fact that the woman herself is incapable of performing the functions of the marriage state or of submitting to sexual intercourse, will justify the action of the defendant in breaking off the engagement. Gring v. Lerch, 112 Pa. St. 244; Goddard v. Westcott, 82 Mich. 180. Insanity of the plaintiff is no defense where she was sane when defendant promised to marry her. Baker v. Cartwright, 10 C. B. N. S. 124, 100 E. C. L. 124. In Goddard v. Westcott, 82 Mich. 180, 46 N. W. Rep. 242, it was held that the fact that plaintiff had a tumor would, under certain circumstances, be a defense. Epilepsy, however, under certain circumstances, has been held not a defense. Walker v. Johnson, 6 Ind. App. 600, 33 N. E. Rep. 267, 34 N. E. Rep. 100. It is also important to remember in all these cases that when defendant desires to rest upon physical disability as a defense, he must plead it. Vierling v. Binder, 113 Iowa, 338.

*Various Other Defenses.*—We shall note briefly, but exhaustively, other defenses which have been allowed by the courts. In the first place, all agreements to marry which are tainted with immoral conditions are void, and such unmoral conditions can be pleaded in defense to an action for breach of promise. For instance, a promise on the part of the defendant to marry plaintiff if she would submit to sexual intercourse with him, cannot be enforced, as such contracts are contrary to good morals. Boigneres v. Boulon, 54 Cal. 146; Goodall v. Thurman, 38 Tenn. 208; Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. Rep. 797. But a promise made subsequent to and unconnected with the one tainted with the immoral conditions, or one made after seduction or in consequence thereof is good. Judy v. Sterrett, 52 Ill. App. 265; Hotchkiss v. Hodge, 38 Barb. (N. Y., 117; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275. It is of course understood, that the fact that plaintiff has recovered damages for seduction under promise of marriage is no bar to her action for a breach of the same promise. Ireland v. Emmerson, 93 Ind. 1, 47 Am. Rep. 364. Where the contract of marriage was made under duress, as for instance to obtain release from arrest or confinement, no action can be maintained for its breach. Tilley v. Damon, 65 Mass. 247; McCrum v. Hildebrand, 85 Ind. 204. What false representations or fraudulent concealment on the part of the plaintiff will justify the defendant in breaking off the engagement are not always easy to determine. It is well settled that it is not the legal duty of either party to communicate all the previous circumstances of his or her life. For instance, a woman is bound to disclose nothing but her previous unchastity or her unfitness for sexual intercourse. These she must disclose as we have found in the first two subdivisions of this subject. But, if upon inquiry by the defendant, or voluntarily, she undertakes to make any statements, or representations whatever as to her past life or present conditions, she is bound to state the truth and conceal nothing that is necessary to a correct understanding of the facts which she relates. Any fraudulent concealment on her part in such a case will avoid a contract to marry subsequently made. Van Houten v. Morse, 162 Mass. 414, 44 Am. St. Rep. 375; Wharton v. Lewis, 1 C. & P. 529, 11 E. C. L. 459. So, also, is defendant released, if such false representation, should come from some third person, as, for instance, the father or mother of the plaintiff. Foote v. Hayne, 1 C. & P. 545, 11 E. C. L. 466. A release by plaintiff is also a good defense. Thus, where, by mutual agreement, the engagement is broken off, the defendant may plead the release in an action for breach of promise. Allard v. Smith, 59 Ky. 297; Dean v. Skiff, 128 Mass. 174; Snell v. Bray, 56 Wis. 156; Shellenbarger v. Blake, 67 Ind. 75; Grant v. Willey, 101 Mass. 356; Mabin v. Webster, 129 Ind. 430, 28 Am. St. Rep. 199. But the mere return of the engagement ring by the plaintiff after defendant has told her he no longer loves her is no defense to plaintiff's action for the breach. Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. Rep. 581; Kraxberger v. Roiter' 91 Mo. 404, 60 Am. Rep. 262. Neither is the agreement of the plaintiff to a postponement of the marriage a justification of the defendant's refusal to consummate the marriage. Clark v. Pendleton, 20 Conn. 495; Nearing v. Van Fleet, 71 Hun (N. Y.), 137, 24 N. Y. Supp. 531. Whether a subsequent promise to marry will avail the defendant has been differently decided. Thus, by the weight of authority an offer to marry by the defendant after breach, has been held no defense. Kutz v. Frank, 76 Ind. 594; Southard v. Rexford, 6 Cow. (N. Y.) 254; Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Wood v. Hogan, 13 Ky. Law Rep. 173. On the other hand, it has been held in other cases to be a complete defense, if made before the commencement of the action. Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 44; Liefmann v. Soloman (N. Y.), 7 Abb. Pr. 409. A peculiar defense was made in the case of Tame v. Appel, 12 Ill. App. 582. In that case two Hebrews fixed a day for their marriage, which they subsequently ascertained to be a day on which, by the customs of their church, marriage was forbidden. It had been agreed between them that the marriage, when celebrated, should be in accordance with the Hebrew usages. The court held that an action, based merely on the refusal to marry on that particular day, could not be maintained.

Outside of the defenses just considered, the courts have not encouraged the defendant to attempt to break off an engagement for any other reason. Thus, profane swearing, habits of drink and mutual improprieties and lewdness between the parties are not classed as defenses to an action for breach of marriage promise. Berry v. Bakeman, 44 Me. 164, Button v. McCauley, 1 Abb. App. Dec. (N. Y.) 282; Burnett v. Simpkins, 24 Ill. 264. Nor is it a defense that defendant broke the contract because he felt that the proposed marriage would not tend to the happiness of both parties. Coolidge v. Neat, 129 Mass. 146. As to these things the parties take each other "for better or for worse" in entering into an engagement to marry as well as in the marriage itself.

ALEXANDER H. ROBBINS.

## BOOK REVIEWS.

### OKLAHOMA FORM BOOK.

A form book at the best is not something over which we can soar to any lofty heights of ecstatic rapture, or make any sublime prophecy of its far-reaching effect upon the laws and civilization of the country. Nevertheless, it is one of those exceedingly practical things, which we can scarcely do without. Oklahoma, while it has not boasted of any great legal authors, is starting in that direction with a form book. The authors of this volume are R. A. Kleinschmidt and Mont. F. Highley of the bar of Oklahoma City, and our careful examination of the volume leads us to the conclusion that it is one of the clearest and most accurate of form books published anywhere in the United States. Printed in one volume of 288 pages, and published by Highley & Kleinschmidt, Oklahoma City, Okla.

## BOOKS RECEIVED.

Greene's Practice Time-Table, consisting of the times required for each step in the practice of law in the state of New York. Alphabetically arranged. Embracing the Code of Civil Procedure, the Code of Criminal Procedure, the Court Rules, the New York City Charter, the General Assignment Act, the Lien Law, the Municipal Court Act and other general Laws of Practice. By H. Noyes Greene, of the Troy Bar. Second Edition. Albany, N. Y., Matthew Bender, 1902. Buckram, 264 pages; price, $2.00.

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. ACKNOWLEDGMENT — Power of Notary to Take. — Under the statutes of Florida, a notary public appointed to act in and for a certain county has no power to take an acknowledgment outside of such county. — Evans v. Dickenson, U. S. C. C. of App., Fifth Circuit, 114 Fed. Rep. 284.

2. ADMIRALTY — Suit by Citizen Against Foreign Ship. —A libel *in rem* should state the nationality of the vessel proceeded against; but such allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.—The Falls of Keltie, U. S. D. C., D. Wash., 114 Fed. Rep. 357.

3. ANIMALS — Trespass by Sheep.—An undertaking on attachment under St. Nev. § 781, relating to live stock, held not without consideration, on theory that writ commanding officer to take all defendant's property not exempt, was not such as contemplated by the statute.—Smith v. Fisher, Utah, 68 Pac. Rep. 849.

4. APPEAL — Evidence Erroneously Excluded. — Evidence having been erroneously excluded on defendant's objection, on appeal the fact to be shown by such evidence was to be taken as established. — Sachs v. American Surety Co., 76 N. Y. Supp. 335.

5. APPEAL AND ERROR — Conflict Between Special Findings and Verdict. — Where a judgment is reversed as conflicting with special findings, and there is no reason to believe that on a new trial the findings will be materially different, judgment will be ordered for appellant.—Bedford Quarries Co. v. Thomas, Ind., 63 N. E. Rep. 880.

6. APPEAL AND ERROR — Review by Supreme Court. — The supreme court will not review errors at a trial in the district courts by petition in error, unless a motion for a new trial was made and a ruling had thereon.—Cedar County v. Goetz, Neb., 91 N. W. Rep. 177.

7. APPEAL—Uncertain Value of Counterclaim.—When a counterclaim should have been allowed, but the evidence of the amount is unsatisfactory, the judgment will be reversed, rather than modified.—Numan v. Wolf, 76 N. Y. Supp. 371.

8. APPEAL AND ERROR — Vacating Judgment. — An order vacating a judgment is not appealable.—Metler v. Metler, Wash., 69 Pac. Rep. 9.

9. APPEARANCE — Attachment. — A nonresident, having appeared in an attachment suit, answered, and filed a bond, held to have submitted himself to the court's jurisdiction and to be subject to personal judgment.—New Albany Mfg. Co. v. Sulzer, Ind., 63 N. E. Rep. 873.

10. ARMY AND NAVY — Enlistment of Minor. — One between 16 and 21 years old, enlisting in army without consent of parents, on representation that he is of age, becomes a soldier, subject to release only on application of his parents, who cannot prevent court-martial of him for past military offenses. — *In re* Miller, U. S. C C. of App., Fifth Circuit, 114 Fed. Rep. 838.

11. ATTACHMENT—Dissolution.—A claim for the contract price of furnishing the marble for a building, less certain specific deductions, where the price which forms the basis of plaintiff's claim is a precise sum, is one for which an attachment may issue —Sullivan v. Moffat, N J., 50 Atl. Rep. 291.

12. ATTACHMENT — Property Subject to Attachment. — Money in the registry of a federal court, pending litigation in regard thereto, remains in the court's custody until paid out by its order pursuant to law, and is not subject to attachment by any other court. — Corbitt v. Farmers' Bank, U. S. C. C., E. D. Va., 114 Fed. Rep. 602.

13. ATTORNEY AND CLIENT—Prospective Lien.—Where plaintiff and his attorney agreed that the attorney should receive one-third of the amount recovered and be reimbursed for all expenses, the attorney had only a prospective lien, which would become vested only by entry of verdict or order for judgment for plaintiff.—Anderson v. Itasca Lumber Co., Minn., 91 N. W. Rep. 12.

14. BANKRUPTCY — Assigned Claim. — Assignment of a claim against bankrupts entitles the assignee to share in the bankrupt estate, if the assignor is estopped from making the same claim. — *In re* Miner, U. S. D. C., D. Oreg., 114 Fed. Rep. 998.

15. BANKRUPTCY — Assignments for Creditors. — A debtor who makes a general assignment for the benefit of creditors may be declared an involuntary bankrupt, that being specified as an act of bankruptcy by Bankr. Act, § 3, and his actual solvency is no defense. — Day v. Beck & Gregg Hardware Co., U. S. C. C. of App., Fifth Circuit, 114 Fed. Rep. 834.

16. BANKRUPTCY—Compelling Production of Assets.—Where a bankrupt admits having had money or property which is not shown by his schedules, it is incumbent on him to clearly account for the same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee. — *In re* De Gottardi, U. S. D. C., S. D. Cal., 114 Fed. Rep. 328.

17. BANKRUPTCY — Criminating Testimony. — A bankrupt, on examination concerning conduct of his business, cannot be compelled to give answer which would tend to criminate him.—*In re* Nachman, U .S. D. C., D. S. Car., 114 Fed. Rep. 995.

18. BANKRUPTCY — Effect of Discharge.—A bankrupt's discharge will not release him from any debt omitted from the schedule, where the omitted creditor had no notice of the bankruptcy procedings in time to prove his claim. — *In re* Monroe, U. S. D. C., D. Wash., 114 Fed. Rep. 397.

19. BANKRUPTCY — Execution of Mortgage. — A debtor who, knowing that he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within Bankr. Act, § 3*a*, par. 2. — *In re* Ed. W. Wright Lumber Co., U. S. D. C., W. D. Ark., 114 Fed. Rep. 1011.

20. BANKRUPTCY — Fiduciary Debt —Where an administrator intentionally mingled the funds of the estate with his own funds, such act constituted a wrongful misappropriation by an officer in a fiduciary capacity, within Bankr. Act 1898, § 17. — Johnson's Admr. v. Parmenter, Vt., 52 Atl. Rep. 73.

21. BANKRUPTCY — Goods Obtained by Fraud. — One from whom a bankrupt obtains goods on time, on false representation that they are to fill an order, held entitled thereto; the whole transaction being a fraud.—Bloomingdale v. Empire Rubber Mfg. Co., U. S. D. C., E. D. N. Y., 114 Fed. Rep. 1016.

22. BANKRUPTCY—Judgment by Consent.—Judgment obtained against bankrupt by consent, after his discharge in bankruptcy, held not affected by the bankruptcy proceedings.—Stevens v. Meyers, 75 N. Y. Supp. 332.

23. BANK RUPTCY—Jurisdiction.—Federal court, sitting as a court of bankruptcy, held not deprived of jurisdiction to correct interlocutory orders by reason of the termination of the term at which they were entered.—*In re* Henschel, U. S. D. C., S. D. N. Y., 114 Fed. Rep. 968.

24. BANKRUPTCY—Possession of Property.—Mortgagee of bankrupt held to have no right to take possession of the mortgaged property after adjudication in bankruptcy. — *In re* Gutman, U. S. D. C., S. D. N. Y., 114 Fed. Rep. 1009.

25. BANKRUPTCY—Preference.—Securities delivered by a senior member of a firm, prior to his bankruptcy, to secure an accommodation indorser on a note given to a bank for the firm on account of the discount of drafts accepted by an insolvent, held a preference under the bankruptcy act.—Crooks v. People's Nat. Bank, 75 N. Y. Supp. 92.

26. BANKRUPTCY — Preferences. — Where net indebtedness of bankrupt stock brokers to customer was increased within four months prior to the adjudication, payments made to the customer within the four months need not be surrendered to entitle creditor to prove his claim. — *In re* Topliff, U. S. D. C., D. Mass., 114 Fed. Rep. 328.

27. BANKRUPTCY — Provable Debts. — A corporation which by an *ultra vires* agreement became a partner in a firm did not thereby lose the right to prove a debt previously contracted by the firm, on its subsequent bankruptcy, where through a mutual mistake it was overlooked and remained unpaid.—*In re* R. T. Ervin & Co., U. S. D. C , E D. Pa., 114 Fed. Rep. 596.

28. BANKRUPTCY — Setting Aside Discharge. — Under Bankr. Act, § 57*n*, a court of bankruptcy is without jurisdiction to set aside a discharge, to reinstate a case and to permit an addition of a creditor to the bankrupt's schedule, more than one year after the adjudication in bankruptcy, without notice to creditor. — *In re* Hawk, U. S. C. C. of App., Eighth Circuit, 114 Fed. Rep. 916.

29. BANKRUPTCY—Voluntary Bankrupts. — A person cannot become a voluntary bankrupt, where the only debt scheduled by him is a judgment rendered against him by a state court for a personal tort, from which an appeal is pending, and the effect of such an appeal under the laws of the state is to supersede the judgment.—*In re* Yates, U. S. D. C., N. D. Cal., 114 Fed. Rep. 365.

30. BANKS AND BANKING—Gift from Husband to Wife. —The fact that assignments of deposits standing in a wife's name had been executed from the wife to the husband did not necessarily show that the deposits belonged to her, and not to him.—Dodge v. Lunt, Mass., 63 N. E. Rep. 891.

31. BILLS AND NOTES—Demand Note.— Action may be maintained on a demand note, without a preliminary demand of payment, even though the note is secured by collateral, to be delivered to the debtor on payment of the note.—Field v. Sibley, 77 N. Y. Supp. 252.

32 BILLS AND NOTES—Suit by Assignee.—In a suit on a note indorsed to plaintiff, it is no defense that the transfer was without consideration.— Snyder v. Grunniger, 77 N. Y. Supp. 234.

33. BONDS—Erasure of Surety's Name.—Persons signing a bond after the erasure of one of the previous signors, and with knowledge thereof, are estopped from claiming prejudice by reason thereof. — Cass County v. American Exch. State Bank, N. Dak., 91 N. W. Rep. 59.

34. BROKERS—Commissions When Earned —Where a real estate agent secured an offer to sell at a price and on terms which are accepted by the intended purchaser, the agent has earned his commissions, though the sale is not completed.—Michaelis v. Roffmann, 76 N. Y. Supp., 973.

35. BUILDING AND LOAN ASSOCIATIONS.— Amount Due on Mortgage.—In ascertaining the amount due on the mortgage to an insolvent building association, executed by a stockholder, premiums paid by him on account of his loan should be credited thereon, but without allowing him interest on the premiums.—Barry v. Friel, U. S. C. C., D. Neb., 114 Fed. Rep. 989.

36. BURGLARY— Property Stolen. — Where an indictment charged burglary with intent to commit theft, without alleging specifically the property taken, the alleged fact that what accused actually stole was a part of the realty, not the subject of theft, would not prevent conviction. — Farris v. State, Tex., 69 S. W. Rep. 140.

37. CANCELLATION OF INSTRUMENTS — Deed Obtained by Fraud.—In a suit to cancel a deed for fraud, intimate relations of friendship between the parties need not be specially pleaded to entitle plaintiff to prove the same.—Wells v. Houston, Tex., 69 S. W. Rep. 183.

38. COMMERCE—Taxation. — City ordinance, in so far as it imposes a license tax on petitioner, who as agent

for a citizen of Ohio solicited orders for goods in the city, held void, as taxing interstate commerce.— *Ex parte* Green, U. S. C. C., W. D. Ky., 114 Fed. Rep. 959.

39. CONSPIRACY — Labor Unions. — If the object of a labor union is unlawful, or if the methods employed by it either to induce acquisitions to its ranks or to accomplish its ulterior purposes are unlawful, all persons who combine in such efforts are conspirators.— United States v. Weber, U. S. C. C., W. D. Va., 114 Fed. Rep. 950.

40. CONSTITUTIONAL LAW—Employers' Liability Act.— The Indiana employers' liability act is not in contravention of the fourteenth amendment to the federal constitution, as denying to corporations the equal protection of the laws, by discriminating between them and individual employers. — Cincinnati, H. & D. R. Co. v. Thiebaud, U. S. C. C. of App., Sixth Circuit, 114 Fed. Rep. 918.

41. CONSTITUTIONAL LAW — Right of Pensioners to Hold Office. — Laws 1901, ch. 466, § 1560, forbidding city pensioners to hold city offices, held unconstitutional. —People v. Woodbury, 77 N. Y. Supp. 241.

42. CONSTITUTIONAL LAW—Validity of Statute.—Where the constitutionality of a statute is doubtful, the unquestioned existence of a similar statute for a long period of years creates a strong presumption in favor of the validity of the statute in question. — Beasly v. Ridout, Md., 52 Atl. Rep. 61.

43. CONTRACTS — Contravention of Statutory Regulations.—A contract in contravention of the statutory regulations of a state and unenforceable in its courts is not *ipso facto* void. — Alleghany Co. v. Allen, N. J., 52 Atl. Rep. 298.

44. CONTRACTS—Fraudulent Representations. — Representations, made by party to induce execution of dredging contract, as to thickness of rock to be removed, held not mere expressions of opinion, but statements of facts. — Hingston v. L. P. & J. A. Smith Co., U. S. C. C. of App., Sixth Circuit, 114 Fed. Rep. 294.

45. CONTRACTS — Placing Business on Paying Basis. —Agreement by corporation to give manager placing its business on a paying basis an interest in its future earnings held valid and enforceable. — Dupignac v. Bernstrom, 76 N. Y. Supp. 381.

46. CONVERSION—Express Trust. — Where the execution of a plan of testator will be so difficult that it would be unreasonable to suppose that such execution was contemplated without diverting the realty into personalty, a direction for such conversion will be deemed expressed in the will by implication. — Becker v. Chester, Wis., 91 N. W. Rep. 87.

47. CORPORATIONS—Authority of President. — Knowledge of president of corporation of an agreement, derived from his unlawfully executing it for the corporation, held not imputable to it —Bangor & P. Ry. Co. v American Bangor Slate Co , Pa., 52 Atl. Rep. 40.

48. CORPORATIONS — Directors Necessary Parties.— Directors of corporation held necessary parties in an action by one claiming a certain payment from the net earnings of the corporation.— Dupignac v. Bernstrom, 76 N Y. Supp. 381.

49. CORPORATIONS—Jurisdiction of Suit Against Foreign Corporation. — A foreign corporation doing business in the state, having no principal office or chief officer residing therein, may be sued in any county wherein it does business, where the cause of action arose out of the state.—Empire Coal & Coke Co. v. Hull Coal & Coke Co , W. Va., 41 S. E. Rep. 917.

50. CORPORATIONS — Lease of Corporate Property as Affecting Minority Stockholders. —Where a street rail way company has leased to another such company at a guaranted rental of 7 per cent., held, it was not a fraud on the minority stockholder.— Content v. Metropolitan St. Ry. Co., 76 N Y. Supp. 151.

51. CORPORATIONS— Statutory Liability of Stockholders.—A proceeding to enforce the additional liability of a stockholder under the constitution or statutes of a state, whether at law or in equity, is based on a common law, and not an equitable, right arising out of the stockholder's contract. —Hale v. Coffin, U. S. C. C. of App., D. Me., 114 Fed. Rep. 567.

52. COSTS—Transcript.—A party including in his brief on appeal, an unnecessary repetition of pleading included in the abstract, is not entitled to an allowance of costs therefor. — Ferguson v. Byers, Oreg., 69 Pac. Rep. 32.

53. COURTS — Suits by Indians. — There is no statute authorizing an Indian agent to sue in behalf of an Indian under his charge, so as to bring such a suit within the jurisdiction of a district court, as one brought by an officer of the United States "authorized bylaw to sue."— *In re* Celestine, U. S. D. C., D. Wash., 114 Fed. Rep. 551.

54. COURTS—Waiver of Jurisdiction. — Want of jurisdiction cannot be waived where the court has no jurisdiction of the subject-matter. — Board of Directors of St. Francis Levee Dist. v. Bodkin, Tenn., 69 S. W. Rep. 270.

55. CRIMINAL LAW — Extrajudicial Confession. — An extrajudical confession was not objectionable on the ground that there was no extraneous fact tending to show guilt, as defendant's identity as the criminal could rest alone upon his confession. — Cox v. State, Tex., 69 S. W. Rep. 145.

56. CRIMINAL TRIAL — Intoxicated Jurors. — Where a juror uses intoxicating liquors, while on a trial, so as to impair his faculties, it constitutes such misconduct, when not waived by the parties, as to invalidate a judgment, unless no prejudice was clearly shown. — State v. Salverson, Minn., 91 N. W. Rep. 1.

57. DAMAGES — For Breach of Contract to Deliver Shares of Stock. — The measure of damages for the breach of a contract by a broker to deliver stocks on demand of a customer, for whom he had bought the same on a margin, is to be determined according to the highest intermediate value of the stocks between the default and a time, after the customer has notice thereof, reasonably sufficient to enable him to replace the stocks. — *In re* Swift, U. S. D. C., D. Mass., 114 Fed. Rep. 947.

58. DAMAGES — Speculative. — Mere speculative and conjectural estimates of profits which might have been made, or the loss of gains and profits which might have been made, are not a legitimate basis for damages for breach of contract. — Douglass v. Ohio River R. Co., W. Va., 41 S. W. Rep. 911.

59. DEATH BY WRONGFUL ACT—Mortality Tables. — In an action for wrongful death, it is not essential to prove the expectation of life of decedent by mortality tables. —Norfolk & W. Ry. Co. v. Philips' Admir., Va., 41 S. E. Rep. 726.

60. DEATH BY WRONGFUL ACT — Pleading. — In the statutory action for wrongful death, a complaint is sufficient, without alleging the facts constituting damages.—Pizzi v. Reid, 76 N. Y. Supp. 306.

61. DISCOVERY — Before Issue Joined. — An order for the examination of defendants before issue joined, so as to enable plaintiffs to plead in action against promoters of a corporation to compel them to account for secret profits, held not to be sustained.— Hutchinson v. Simpson, 77 N. Y. Supp. 197.

62 ELECTIONS — Change of Venue. — A denial of a change of venue will not authorize reversal of a judgment of conviction, where defendant had a fair trial.—State v. Gilbert, Idaho, 69 Pac. Rep. 62.

63. ELECTIONS — Illegal Votes.—In determining what shall constitute a majority of votes at an election, those ballots only that are in legal effect votes are to be considered.—Lane v. Otis, N. J., 52 Atl. Rep. 305.

64. EMBEZZLEMENT — Excessive Penalties. — Under Rev. St U. S , § 4046, limiting the fine, on conviction of embezzlement, to the amount embezzled, a judgment imposing a fine for an amount equal to the amount em-

bezzled and also the costs of the prosecution is erroneous —Whitworth v. United States U. S. C. C of App., Eighth Circuit, 114 Fed. Rep 302.

65. EMINENT DOMAIN — Property Value in Condemnation Proceedings.—In determining the value of property in condemnation proceedings, the market value of the property for valuable uses, both now and in the future, must be considered. — Richmond, P. & C. R. Co. v. Chamblin, Va., 41 S. E. Rep. 750.

66. EMINENT DOMAIN — Removal of Mains and Pipes by Drainage Commission. — Drainage commission of New Orleans cannot require removal of water mains and pipes belonging to New Orleans Waterworks Company without first making just and adequate compensation, as required by Const. La. art. 167. — Moore v. New Orleans Waterworks Co., U. S. C. C., E D. La., 114 Fed. Rep. 380.

67. EMINENT DOMAIN—Reservations in Deed.— A deed reserving to the grantor all claim for damages to the property by construction, etc , of a railroad, held not to entitle the grantor to have the grantee's recovery of such damages paid into court in an action by the grantor, but to entitle him, on giving bond, to apply for an injunction to restrain payment to the grantee. — Shepard v. Manhattan Ry. Co., 76 N. Y. Supp. 269.

68. EQUITY—Decree.—A bill for the vacation of a prior decree of the same court, which charges fraud and error on the face of the record as the only grounds for the relief asked, will not sustain a decree granting such relief on the ground of mistake of facts. — Hendryx v. Perkins, U. S. C. C. of App., First Circuit, 114 Fed. Rep. 801.

69. ESTOPPEL— Divorce. — A wife invoking jurisdiction of court to grant her a divorce, cannot afterwards allege its nullity.—Lacey v. Lacey, 77 N. Y. SUPP. 235.

70. ESTOPPEL — Liability for Paving Street.—Contract held not ratified by a payment for work thereunder, warning being given that it was not to be considered an admission of further liability. — City of Williamsport v. Williamsport Pass. Ry. Co., 52 Atl. Rep. 51.

71. EVIDENCE — Conveyance to Child.—In an action to set aside a deed for want of capacity, the opinion of an old neighbor held not objectionable, as contravening the rule against non-expert testimony, except on a statement of the basis therefor.—Sargent v. Burton, Vt., 52 Atl. Rep. 72.

72. EVIDENCE — Defective Title.—The mere opinion of lawyers or title guaranty companies is not sufficient to show a defective title. — Hess v. Eggers, 76 N. Y. Supp. 980.

73. EVIDENCE — Space Within Which Car May be Stopped. — Expert evidence is admissible to determine within what space a street car running under certain conditions may be stopped. — Norfolk Ry. & Light Co. v. Corletto, Va., 41 S. E. Rep. 740.

74. EXECUORS AND ADMINISTRATORS — Limitations.— Executors have no power to use the assets of the estate for the payments of debts of the testator which were barred by limitation at his death. — Hamlin v. Smith, 76 N. Y. Supp. 258.

75. EXECUTORS AND ADMINISTRATORS—Overpayment to Legatee.—Executor, empowered to use the income of the realty for the support of an infant devisee of an undivided half therefor, held not entitled to a lien on the proceeds of a partition sale of the realty for payments made by him for the infant's support in excess of the income.—Johnson v. Weir, 76 N. Y. Supp. 76.

76. EXECUTORS AND ADMINISTRARORS — Parties. — Where one of the parties to a contract was dead when suit was brought thereon, his personal representative should have been made a party. — Foreign Hardwood Log Co. v. Coffin, N. Car., 41 S. E. Rep. 981.

77. EXECUTORS AND ADMINISTRATORS — Renunciation of Right to Administer. — Sole legatee under a will, assigning all her interest and filing renunciation of her right to administer will not be allowed to withdraw the latter.—*In re* Clute's Estate, 76 N. Y. Supp. 456.

78. EXECUTORS AND ADMINISTRATORS — Right to Administer.—A niece held entitled to administer in preference to a grandnephew, because nearer of kin to the intestate.—*In re* Hawley's Estate, 76 N. Y. Supp. 461.

79. FEDERAL COURTS—Judgments in Criminal Cases.— Rev. St., § 916, providing that the party recovering a judgment in any common law cause in any circuit or district court is entitled to the same remedies as are provided in like causes by the law of the state, does not applyto judgments in criminal cases.—Clark v. Allen, U. S. D. C., W. D. Va., 114 Fed. Rep. 374.

80. FRAUDS, STATUTE OF Oral Promise by Mortgagor. —An oral agreement by a mortgagee with a contractor to pay for materials furnished and to be furnished for buildings for the mortgagor held not within the statute of frauds —Boeff v. Rosenthal, 76 N. Y. Supp. 988.

81. FRAUDS, STATUTE OF—Part Performance.—There having been a part performance of oral contract for sale of land, the vendee cannot repudiate it, and recover as for money had and received payments made.— Johnson v. Puget Mill Co., Wash., 68 Pac. Rep. 867.

82. HABEAS CORPUS—Illegal Arrest.—On *habeas corpus* to review the commitment of a woman to the workhouse, after trial, the fact that she was arrested by an officer without a warrant, who was not present when her alleged offense was committed, cannot be shown.— People v. Warden of City Prison, 76 N. Y. Supp. 286.

83. HUSBAND AND WIFE—Joinder of Husband.—Under Code Civ. Proc., § 370, making the husband a necessary party defendant in actions against the wife, it is not only necessary that he be named in the complaint, but he must be served.—McDonald v. Porsh, Cal., 68 Pac. Rep. 817.

84. HUSBAND AND WIFE — Necessaries Purchased by Wife.—A husband living with his wife vests her with the authority to purchase on his credit articles not necessaries in fact, because of being adequately supplied.—Wanamaker v. Weaver, 76 N. Y. Supp. 390.

85. HUSBAND AND WIFE—Ratification of Void Mortgage.—A married woman cannot ratify a mortgage of her separate property, void because of defective acknowledgment, except by a reacknowledgment or a second instrument expressly given for the purpose.— Evans v. Dickenson, U. S. C. C. of App., Fifth Circuit, 114 Fed. Rep. 284.

86. HUSBAND AND WIFE—Torts of Wife. —A wife is liable for torts committed in the control of her separate property, since the statutes relating to married woman.—D. Wolff & Co. v. Lozier, N. J., 52 Atl. Rep. 303.

87. HUSBAND AND WIFE—Wife's Separate Property — Where a husband causes a note secured by deed of trust to be executed in his wife's favor, it becomes her separate property.—Case v. Espenschied, Mo., 69 S. W. Rep. 276.

88. INJUNCTION—Ordering Employees of Receiver to Quit Work.—Action on the part of a union composed of mining employees in ordering persons employed by receivers of a particular mining corporation to quit work is in itself a direct violation of the order of court directing the receivers to operate the plant.—United States, v. Weber, U. S. C .C., W. D. Va., 114 Fed. Rep. 950.

89. INJUNCTION—Premature Suit.—An injunction held not to lie to restrain erection of bridge in a street; it not appearing any immediate injury was threatened.— Lester Real Estate Co. v. City of St. Louis, Mo., 69 S. W. Rep. 300.

90. INJUNCTION—Violation of City Ordinance.—Injunction will not lie to restrain the posting of bills in a city, in violation of an ordinance making it criminal to post bills without a permit from the mayor.—City of Mt. Vernon v. Seeley, 77 N. Y. Supp. 250.

91. INSURANCE—Beneficiaries. — Illegitimate children, whom one insured in a benefit order had supported for years, held "dependents," within the terms of the insurance certificate.—Hanley v. Supreme Tent Knights of Maccabees, 77 N. Y. Supp. 246.

92. INSURANCE—Purchaser of Interest in Other Corporation.—The use of funds of an insurance company by its directors to purchase the interest of the surviving directors of another corporation held an *ultra vires* act, constituting waste, for which the directors were liable to the receiver of the purchasing corporation.—Gilbert v. Finch, 76 N. Y. Supp. 143.

93. INSURANCE — Receivers.—An insurance company being practically out of business, and large salaries being still drawn by the officers, who voted them to themselves, a receiver will be appointed at suit of a stockholder —Treat v. Pennsylvania Mut. Life Ins. Co., Pa., 52 Atl. Rep. 60.

94. INTOXICATING LIQUORS—Local Option.—Where defendant admits that there was a legal local option election, and that prohibition was in effect at the time of the sale, he cannot object on appeal that there was no valid petition for such election.—Penn. v. State, Tex., 68 S. W. Rep. 170.

95. INTOXICATING LIQUORS — Signatures by Mark to Petition.—Signatures to a petition to prohibit sale of liquors, made by mark and not attested, are not evidence of a signing of the names of the persons represented by them.—Fakes v. Wilder, Ark., 69 S. W. Rep. 260.

96. JUDGES—Disqualification.—A judgment of conviction in a criminal case before a disqualified judge is void.—Woody v. State, Tex., 69 S. W. Rep. 155.

97. JUDGMENT—Breach of Warranty.—A buyer's cause of action for breach of warranty held not adjudicated in an action for the purchase price, in which no claim of set-off was made for such breach.—Dilley v. Rateliff, Tex., 69 S. W. Rep. 237.

98. JUDGMENT — Fictitious Name of Defendant. — A judgment recovered in a municipal court against a defendant by a fictitious name cannot, when the proof shows her true name, be docketed without inserting the true name in the record.—Bernstein v. Schoenfeld, 76 N. Y. Supp. 140.

99. JUDGMENT— Interlocutory. — Statement in interlocutory judgment in partition as to interest of a certain beneficiary held not binding on other beneficiaries, whose rights where not drawn in issue.—Rudd v. Cornell, N. Y., 63 N. E. Rep. 823.

100. JUDGMENT—Res Judicata.—A judgment for plaintiff in an action against a railroad company for injuries from the negligent construction and operation of stock pens is not a bar to a subsequent action by plaintiff to recover damages for the permanent depreciation n value of his property.—Bramlette v. Louisville & N. R. Co., Ky., 68 S. W. Rep. 145.

101. JUDGMENT—Res Judicata.—That party entitled to damages for a nuisance had brought action against the wrong defendant, and is defeated, held no bar to an action against the proper parties.—Dumois v. City of New York, 76 N. Y. Supp. 161.

102. JURY—Challenges.—Where defendants did not exercise or attempt to use all the six challenges which they were allowed, they could not complain on appeal of a refusal to allow them separate jury lists and six peremptory challenges each.—Wells v. Houston, Tex., 69 S. W. Rep. 183.

103. JUSTICES OF THE PEACE — Counterclaim. — The pleadings in an action in justice's court for a certain claim, and to foreclose a mortgage, in which defendant sets up a counterclaim, held to show an amount in controversy not beyond the jurisdiction of the court.—Rhodes-Haverty Furniture Co. v. Henry, Tex., 67 S. W. Rep. 340.

104. LANDLORD AND TENANT — Leased Land.—Where, after a sublessee enters and cultivates a crop, the owner claims a part of the gathered crop as rent, there is a sufficient ratification of the subletting.—Moore v. Graham, Tex., 69 S. W. Rep. 200.

105. LANDLORD AND TENANT—Liability of Lessee of Building for Public Purposes.—Where, for the purpose of holding a public ceremony, one leases a building constructed for such purposes, any liability of the lessee for injuries from defective construction or maintenance must be limited to such defects as inspection would have disclosed.—Eckman v. Atlantic Lodge, No. 276, B. P. O. E., N. J., 52 Atl. Rep 293.

106. LANDLORD AND TENANT—Surrender of Possession. —Where the agent of a tenant surrendered possession of the leased premises to the landlord on the last day for which rent had been paid, the lease was thereby extinguished, and rent for the next quarter could not be collected.—Ireland v. United States Mortgage & Trust Co., 76 N. Y. Supp. 177.

107. LANDLORD AND TENANT—Tax Sale.—There is no duty resting on a tenant to protect the land from judicial sales which will prevent him bidding it in for himself at a tax sale.—Crosby v. Bonnowsky, Tex., 69 S. W. Rep. 212.

108. LIBEL AND SLANDER — Evidence Showing Aggravation of Damages. — In an action for slander, evidence that defendant was a man of wealth and standing in the community was admissible to show aggravation of damages.—Kidder v. Bacon, Vt., 52 Atl. Rep. 322.

109. LIBEL AND SLANDER— Express Malice —In an action for libel, evidence that plaintiff went to the responsible editor of the newspaper and requested a retraction, which was refused, held admissible on the question of express malice. — Stokes v. Morning Journal Assn., 76 N. Y. Supp. 429.

110. LIENS—Lien of Stock of Goods —A note giving a lien on goods to secure its payment created a lien only on the stock then on hand, and after four years the burden was on the payee to show what part of the original stock remained.—Thornberry v. Thornberry's Admx., Ky., 68 S. W. Rep. 129.

111. LIFE INSURANCE—Variance Between Application and Policy.—An insured under a life policy and all claiming under him are estopped from repudiating the application as a part of the contract, because the policy is not made payable to the beneficiary designated in the application, where it was accepted with knowledge of such fact and subsequently assigned to such beneficiary. —Mutual Life Ins. Co. v. Kelly, U. S. Ct C. of App., Eighth Circuit, 114 Fed. Rep. 268.

112. LIMITATION OF ACTION—Ignorance of Facts.—Mere ignorance of the facts cannot take a case out of the statute of limitations, but diligence to discover the facts must also be shown.—Darnold v. Simpson, U. S. C. C., W. D. Mo., 114 Fed. 368.

113. MALICIOUS PROSECUTION — Probable Cause.—In action for malicious prosecution, fact that grand jury ignored bill against plaintiff was *prima facie* evidence of want of probable cause.—Ambs v. Atchison, T. & S. F. Ry. Co., U. S. C. C., E. D. Mo., 114 Fed. Rep. 317.

114. MASTER AND SERVANT—Contract of Employment. —Delay in discharging an employee for his failure to make daily reports as agreed in his contract of employment, held no waiver of the employer's right to discharge. — Johnson v. E. Van Winkle Gin & Machine Works, N. Car., 41 S. E. Rep. 882.

115. MASTER AND SERVANT — Defective Machinery. — When a servant, relying on the master's promise to repair, continues to use defective machinery for a reasonable time, he does so at the master's risk.— Boyd v. Blumanthal, Dela., 52 Atl. Rep. 330.

116. MASTER AND SERVANT—Duty of Inspection.—A telegraph company cannot avoid responsibility for the failure to perform the positive duty of making proper inspection of poles upon which its lineman are required to work by delegating such duty to another, however competent.—Western Union Tel. Co. v. Tracy, U. S. C. C. of App., Third Circuit, 114 Fed. Rep. 282.

117. MASTER AND SERVANT — Fellow Servant Laws of Mexico. — Under the law of Mexico the doctrine of the common law as to the liability of employers to an employee for the negligence of a fellow servant is not in force, and a railroad company is liable for all injuries

occurring through the negligence of its employees, whether the person injured be an employee or a stranger.—Mexican Cent. Ry. Co. v. Sprague, U. S. C. C. of App., Fifth Circuit, 114 Fed. Rep. 544.

118. MASTER AND SERVANT—Injury to Employee.—A servant is entitled to assume, in the absence of notice to the contrary, that the master has exercised reasonable care in providing for the safety of the servant.—Carroll v. Tidewater Oil Co., N. J., 52 Atl. Rep. 275.

119. MASTER AND SERVANT—Personal Injuries.—A man who excavated under a railroad track remained to assist the masons in putting in a culvert, and was killed by a caving in of the excavation, held injured by his own negligence or that of his fellow servants.—Litchfield, R. & P. Ry. Co., 76 N. Y. Supp. 80.

120. MASTER AND SERVANT — Proximate Causes.—Where an injury is the result of two concurring causes, and the master is responsible for or contributed to one of them, he is not exempt from liability because a fellow servant, who is responsible for the other cause, may have been also culpable.—Jenkins v. Mammoth Min. Co., Utah, 68 Pac. Rep. 845.

121. MASTER AND SERVANT — Wrongful Discharge.—A servant, discharged in violation of a contract of employment, is not required to offer his service to his employer after such time in order to maintain an action for the wrongful discharge. — Hess v. Citron, 76 N. Y. Supp. 994.

122. MECHANICS' LIENS — Abandonment of Work.—Where a contract requires payments in installments as the work progresses, and the contractor has abandoned the work on account of the owner's failure to pay an installment, it is incumbent on him, in a mechanic's lien suit, to show a full performance of his precedent obligations.—McGrath v. Horgan, 76 N. Y. Supp. 412.

123. MINES AND MINERALS — Mining Claim Contest.—The fact that defendant had contracted to purchase a mining claim from plaintiff, conditioned upon the obtaining of a patent therefor, did not deprive him of the right to contest the allowance of such patent as to a portion of the claim which overlapped a prior claim owned by himself.—Griffin v. American Gold Min. Co., U. S. C. C. of App., Ninth Circuit, 114 Fed. Rep. 887.

124. MORTGAGES — Parties to Foreclosure Suit.—Purchasers of mortgaged property, who do not assume the mortgage debt but afterwards execute a bond to the mortgagee as collateral security for the debt, are not necessary parties to a foreclosure suit.—Baker v. Potts, 76 N. Y. Supp. 406.

125. MUNICIPAL CORPORATIONS — Civil Service. — The civil service law held not to apply to sergeants-at-arms of the New York city council.—Shaughnessay v. Fornes, 77 N. Y. Supp. 223.

126. MUNICIPAL CORPORATIONS — Claims for Injuries Due to Negligence. — Sixty days allowed by the charter of Ithaca for the presentation of claims for injuries arising from negligence is not so short a time as to be unreasonable. — Jewell v. City of Ithaca, 76 N. Y. Supp. 126.

127. MUNICIPAL CORPORATIONS—Defective Sidewalk.—A depression of an inch and a quarter in hexagonal cement block in a city sidewalk at a place very extensively used may constitute such a defect as to render the city liable for damages for failure to remedy the same.—Bieber v. City of St. Paul, Minn., 41 N. W. Rep. 20.

128. MUNICIPAL CORPORATIONS — Liability for Tort.—Where a village is incorporated in a city, and abolished, one having right of action against it for a defective sidewalk has his remedy over against the city. — Tyler v. Village of Lansingburg, 76 N Y. Supp. 139.

129. MUNICIPAL CORPORATIONS—Negligence.—When a city knowingly allows a boiler to be maintained in a basement attached to a building and located under a sidewalk, without the basement being constructed as required by the city ordinances, evidence of the injury of a traveler on the street by an explosion is *prima facie* proof of negligence on the part of the city.—Beall v. City of Seattle, Wash., 69 Pac. Rep. 12.

130. MUNICIPAL CORPORATIONS — Paving Contract.—Where a street contractor has been illegally compelled to relay pavement, he may either stop work and sue for damages, or perform the work and sue on the ground that he has been unlawfully compelled to do the work a second time.—Gearty v. City of New York, N. Y., 63 N. E. Rep. 804.

131. NEGLIGENCE — Construction of Building. — That the floor of a room in an office building was 4 7-8 inches above the floor of the hallway held not of itself negligence, rendering owner liable to licensee. — Ware v. Evangelical Baptist Benevolent & Missionary Soc., Mass., 63 N. E. Rep. 885.

132. NEGLIGENCE — Liability for Death of Cattle From Noxious Vegetation.—Railway company held not liable for death of cattle occasioned by eating poisonous grass on right of way.—Brown v. Missouri, K. & T. Ry. Co. of Texas, Tex., 69 S. W. Rep. 178.

133. NUISANCE — Coal Depot.—In an action for damages from a coal depot, permanent in character, the measure of damages is the depreciation of plaintiff's property, and personal annoyance cannot be separately compensated. — Daniel v. Ft. Worth & R., G. Ry. Co., Tex., 69 S. W. Rep. 198.

134. PARTITION—Presumption of Regularity.—Where a court of general jurisdiction has jurisdiction over both persons and the subject-matter in partition proceedings, it will be presumed that all the necessary persons were made parties and that the sale was confirmed.—Kansas City v. Scarritt, Mo., 69 S. W. Rep. 283.

135. PARTNERSHIP — Mortgage. — In an action to foreclose a firm mortgage on land which afterwards became the sole property of one partner, evidence that on the dissolution of the firm the other partner assumed all the firm debts, including such note, was inadmissible.—Eastham v. Patty, Tex., 69 S. W. Rep. 224.

136. PATENTS—Infringement.—A temporary injunction should not be granted on *ex parte* affidavits in a suit for infringement of a patent, where the question of infringement is grave and it is not clear that defendant is guilty.—Stearns-Roger Mfg Co. v. Brown, U. S. C. C. of App., Eighth Circuit, 114 Fed. Rep. 939.

137. PAUPERS — Confinement in Asylum.—It is proper, in cases where it may be done without undue delay, to provide for the payment of claims by the state for the support of pauper lunatics out of the income of estate subsequently acquired by them. — Schroer v. Central Kentucky Asylum for Insane, Ky., 68 S. W. Rep. 150.

138. PAUPERS — Special Legislation. — The legislature has no power to fix one rate for pay patients who are admitted into a state asylum as such, and to fix another rate one-third greater for patients who are admitted as paupers, but subsequently become able to pay.—Schroer v. Central Kentucky Asylum for Insane, Ky., 68 S. W. Rep. 150.

139. PERPETUITIES — Equitable Conversion. — Where realty is conveyed by will to trustees, with absolute power to convert into personalty and to hold the equivalent for a period beyond the term for which the absolute power to alienate the realty could be suspended, the trust held valid.—Becker v. Chester, Wis., 91 N. W. Rep. 87.

140. PLEADING—Changing Cause of Action.—Plaintiff, as condition to amendment substituting an entirely new cause of action, should pay costs to date —Thilemann v. City of New York, 76 N. Y. Supp. 132.

141. PRINCIPAL AND AGENT — Form of Judgment Against Surety.—Where an action is brought against a principal and sureties, the judgment should be in form a part of the judgment rendered against a principal.—Robinson v. Chamberlain, Tex., 68 S. W. Rep. 209

142. PRINCIPAL AND AGENT—Ratification.—Ratification is the adoption of an act which has been done by one who was in fact acting as an agent.—Hayward v. Langmaid, Mass., 63 N. E. Rep. 912.

143. PRINCIPAL AND AGENT — Ratification.—Where, in an action of trespass to try title, plaintiff claims under a deed executed by an agent, he may show ratification by the principal of the agent's act, without pleading such ratification. — Kirkpatrick v. Tarlton, Tex., 69 S. W. Rep. 179.

144. PRINCIPAL AND SURETY — Bond to Erect Building.—Where a purchaser of land gave an undertaking to the vendor to erect a building on the land, an assignment of the contract by the purchaser was no defense to the surety on the bond, where the defense was not pleaded. — Sachs v. American Surety Co., 76 N. Y. Supp. 335.

145. RECEIVERS — Agreement by Water Company.— Agreement made by New Orleans Waterworks Company with drainage commission respecting removal of water mains and pipes at former's expense held not binding on receiver afterwards appointed for the company on behalf of bondholders.—Moore v. New Orleans Waterworks Co., U. S. C. C., E. D. La., 114 Fed. Rep. 380.

146. REMOVAL OF CAUSES — Proceeding After Removal. — The removal of a cause from a state to a federal court does not admit that it was rightfully pending in the state court, nor deprive the defendant of the right to move for the abatement of an attachment by which that court acquired jurisdiction.—Corbitt v. Farmers' Bank, U. S. C. C. E. D. Va., 114 Fed Rep. 602.

147. REMOVAL OF CAUSES — Time for Filing Petition.— The time within which a petition for the removal of a cause from a state to a federal court may be filed is not extended by the filing of a plea to the jurisdiction.—Olds v. City Trust, Safe Deposit & Surety Co., U. S. C. C., D. Mass., 114 Fed. Rep. 975.

148. SALES— Action for Price. — A purchaser of goods cannot keep part and return the remainder, and defeat payment on the ground that the part returned was not of the agreed quality or make. — Manss-Bruning Shoe Mfg. Co. v. Prince, W. Va., 41 S. E. Rep. 907.

149. SALES — Passage of Title.—Where one sold unfinished brick, to be completed by him, the conduct of his mortgagee in taking possession of the brick and completing them gave him no rights in or lien on the brick as against the purchaser. —Whittle v. Phelps, Mass., 63 N. E. Rep. 907.

150. SUNDAY—Playing Base Ball.—Playing base ball on Sunday, when not interrupting religious repose, held not a violation of Pen. Code, § 265.—People v. De Mott, 77 N. Y. Supp. 249.

151. TELEGRAPHS AND TELEPHONES—Delay in Transmitting Message.—Where the lines of a telegraph company are down when a message is tendered, if it is received without informing the sender of the defects in the lines, it is liable for any delay.—Western Union Tel. Co. v. Birge-Forbes Co., Tex , 69 S. W. Rep. 181.

152. TELEGRAPHS AND TELEPHONES—Failure to Deliver Message to Wife.—The failure to deliver a telegram to a wife of the sender, in the absence of the latter, held not to render the company liable for damages.—Western Union Tel. Co. v. Moseley, Tex., 67 S. W. Rep. 1059.

153. TERRITORIES— Courts.—Rev. St. U. S., § 858, relating to competency of witnesses as to transactions with decedents, does not apply to territorial courts.—Corbus v. Leonhardt, U. S. C. C. of App., Ninth Circuit, 114 Fed. Rep. 10.

154. THEATERS AND SHOWS — Opera House Tax. — Under Revenue Law 1901, §§ 33, 36, a musical conservatory owning a hall in which is given entertainments for the benefit of its pupils is not liable to the opera house tax. —Markham v. Southern Conservatory of Music, N. Car., 41 S. E. Rep. 531.

155. TOWAGE — Priority of Liens.—An admiralty lien for towage is inferior to a statutory lien for repairs; the towage having been performed more than six months before, without effort to collect therefor till after, the repairs.—The Sleepy Hollow, U. S. D. C., D. Conn., 114 Fed. Rep. 367.

156. TRADE-MARKS AND TRADE-NAMES. — Property Right in Name.—When a partnership for many years has designated itself as the "Cyclops Machine Works," equity will not allow another to use the word "Cyclops" for the purpose of getting away the business of the former.—Hainque v. Cyclops Iron Works, Cal., 68 Pac. Rep. 1014.

157. TRESPASS TO TRY TITLE — Expense of Defending Title. — Expenses of securing prior judgment against outside parties, which judgment is pleaded by defendant in trespass to try title, held not a lien on plaintiff's recovery.—Gordon v. Hall, Tex., 69 S. W. Rep. 219.

158. TRIAL — Acceptance of Verdict. — Voluntary acceptance by plaintiff of insufficient verdict held to preclude subsequent motion to reform it —Fay Fruit Co. v. Talerico, Tex., 69 S. W. Rep. 196.

159. TRIAL — Admission of Evidence. — The order of proof is largely within the discretion of the court, and the admission of evidence without the requisite preliminary or connecting proof is not prejudicial error, when such proof is subsequently introduced. — Swensen v. Bender, U. S. C. C. of App., Ninth Circuit, 114 Fed. Rep. 1.

160. TRIAL — Evidence. — A general objection to all of the testimony of a witness is properly overruled, when a part of it is competent. — Hamilton v. Maxwell, Ala., 32 South. Rep. 13.

161. TRIAL — Failure to Request Special Findings. — A request for special findings, after the court had announced its findings and entered final judgment, came too late.—Kansas City v. King, Kan., 68 Pac. Rep. 1093.

162. TRIAL — Instructions. — Where defendant desires more specific instructions, he should request them.— Lampley v. Atlantic Coast Line R. Co., S. Car., 41 S. E. Rep. 517.

163. TRIAL — Instructions. — Instructions singling out and giving undue prominence a portion of the facts, and which would likely mislead the jury, held properly refused. — Sherwin v. Rutland R. Co., Vt., 51 Atl. Rep. 1089.

164. TRIAL — Motion to Strike Out.—Where admission of evidence of a conversation is objected to as a whole, and part is admissible, allowing the entire conversation to be considered is not error, if no motion to strike out is made. — Smith v. Duncan, Mass., 63 N. E. Rep. 938.

165. TRIAL—Preponderance of Evidence —An instruction that plaintiff has the burden of proving his case by a preponderance of the evidence is not erroneous in failing to define the phrase "preponderance of the evidence," unless it is clearly used in a misleading context. —Jones v. Durham, Mo., 67 S. W. Rep. 976.

166. TROVER AND CONVERSION— Agent's Apparent Authority. — Defendant, having received plaintiff's checks indorsed by an agent without authority, and having appropriated the proceeds through subsequent indorsers, held liable to plaintiff for wrongful appropriation. —Graton & Night Mfg. Co. v. Redelsheimer, Wash., 68 Pac. Rep. 879.

167. TRUSTS—Accumulated Profits.—Evidence under a will directing distribution of income of a residue of property consisting of corporate stock, held to show that a dividend declared from accumulated profit was a dividend of income, and not of capital, entitling the life tenants thereto.—Hemenway v. Hemenway, Mass., 63 N. E. Rep. 919.

168. TRUSTS — Removal of Trustee. — While a trustee may be removed by a majority of the *cestuis que trustent*, when given power by the instrument creating the trust, notwithstanding the pendency of a suit by him to enforce the trust, in such case the removal is subject to the approval of the court which has acquired jurisdiction over the trust. — March v. Romare, U. S. C. C. N. D. Ala., 114 Fed. Rep. 200.

169. TRUSTS—Testamentary Trustee.—Where an executor, who is also named as trustee, takes possession of

and administers the estate until the termination of the trust, the burden is on him, if he claims compensation as trustee, to show when this relation began. — Bemmerly v. Woodard, Cal., 68 Pac. Rep. 1017.

170. TRUSTS — Trustee's Commission.—A trustee is entitled to have his commission paid out of the principal of the trust fund, where there have been no earnings.—Whittingham v. Schoefield's Trustee, Ky., 68 S. W. Rep 116.

171. USURY—Payment of Usurious Debt by Surety.—A surety who pays a note tainted with usury, having knowledge of the usury when he does so, cannot recover the amount of the usurious interest from his principal.—Boren v. Boren, Tex., 68 S. W. Rep. 184.

172. VENDOR AND PURCHASER—Bona Fide Purchaser.—A purchaser who paid for land with worthless mining stock was not a *bona fide* purchaser for value.—Sewell v. Nelson, Ky., 67 S. W. Rep. 985.

173. VENDOR AND PURCHASER—Caveat Emptor.—The rule of *caveat emptor* does not obtain where one buys on a warranty or express representation as to the depth of a lot.—Wolf v. Christman, Pa., 51 Atl. Rep. 1102.

174. VENDOR AND PURCHASER — Foreclosure by Vendor. — A decree in suit to foreclose vendee's interest in land held insufficient for not requiring plaintiff to execute a sufficient deed contemporaneously with completion of payment of purchase price, or suffer a dismissal of the bill. — Wollenberg v. Rose, Oreg., 68 Pac. Rep. 804.

175. VENDOR AND PURCHASER—Opinion of Attorney.—Where purchaser of land posts forfeit, to be paid vendor if balance is not paid after opinion of attorney as to title is furnished by one to be agreed on, refusal of vendee to agree works no forfeiture, unless made in bad faith.—Buford v. Landrum, Tex., 67 S. W. Rep. 1066.

176. VENDOR AND PURCHASER—Purchaser with Notice.—Where a deed from heirs was not to be binding until signed by all, the fact that it was not so signed and that the grantors continued in possession, held sufficient to put a purchaser from the grantee on inquiry.—Lyttle v. Fitzpatrick, Ky., 67 S. W. Rep. 988.

177. VENDOR AND PURCHASER—Right to Reconvey.—Where land is conveyed with understanding that the grantee shall have the privilege of reconveying, and in an action on the purchase-money note he seeks to have it declared unenforceable, the burden is on him to show a tender of a deed.—Pursley v. Good, Mo., 68 S. W. Rep. 218.

178. VENDOR AND PURCHASER — Vendor's Lien Note.—An assignee of a vendor's lien note after maturity takes subject to the equities of persons previously receiving conveyances from the vendee, accompanied by releases given by the vendor. — Lattimore v. Provine, Tex., 69 S. W. Rep. 222.

179. WATERS AND WATER COURSES — Protection of Police Power.—Both the drainage commission of New Orleans and the New Orleans Waterworks Company are agencies of the state and city in providing for the public health and safety, and both are entitled to the support and protection of the police power. — Moore v. New Orleans Waterworks Co., U. S. C. C., E. D. La., 114 Fed. Rep. 380.

180. WATERS AND WATER COURSES — Temporary Injunction. — Where, in an action to restrain defendants form diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a temporary injunction will work less hardship than its refusal, it should be granted.—Copper King v. Wabash Min. Co., U. S. C. C., S. D. Cal., 114 Fed. Rep. 991.

181. WILLS—Attesting in Testator's Presence.—A will is attested in testator's presence; the table on which it is placed being in his sight, though the witnesses stand with their backs to him, so that he cannot see the pen or the hand holding the pen. — *In re* Tobin, Ill., 63 N. E. Rep. 1021.

182. WILLS—Condition Against Alienation. — A provision of a will that land devised to an infant shall not be sold until he is 35 years old is an absolute condition, and valid.—Wallace v. Smith, Ky., 68 S. W. Rep. 131.

183. WILLS — Condition Precedent. — Condition that devisee in remainder shall live with testator's widow during her life held a condition precedent to her right to take under the will.—Shuman v. Heldman, S. Car., 41 S. E. Rep. 510.

184. WILLS — Liability of Legatee for Debts of Testator. — Assets distributed to legatees remain ordinarily impressed with a trust in favor of unpaid creditors of the estate, and may be subjected by a suit in equity in any court of competent jurisdiction within the period permitted by the statute of limitations.— Hale v. Coffin, U. S. C. C., D. Me., 114 Fed. Rep. 567.

185. WILLS—Revocation.— On an issue whether a will was revoked by the testator, testimony as to declarations by testator, subsequent to the will, tending to show that nearly to the time of his death he believed himself testate, was incompentent. — *In re* Hopkins' Will, 77 N. Y. Supp. 178.

186. WILLS—Right to Interest.—Where legacies are payable to infants on their coming of age, they do not carry interest during the minorities of the infants, unless testator stood in *loco parentis* as to such infants.—Lyons v. Steinhardt, 76 N. Y. Supp. 241.

187. WILLS—Sale of Legacy.—One entitled to legacies of $2,800, after death of life tenant, cannot, in the absence of fraud, oppression, or deceit, avoid his sale thereof for $500.—*In re* Jackson's Estate, Pa., 52 Atl. Rep. 125.

188. WITNESSES—Alteration of Mortgage Note.—A refusal to exclude evidence that a wife had authorized her husband to alter a mortgage note after it had been signed, as having been done only in private conversation, held proper.—Nichols v. Rosenfeld, Mass., 63 N. E. Rep. 1063.

189. WITNESSES—Confidential Communication. — The rule that an attorney cannot testify to communication by his client does not apply when such communication is made when the attorney is acting for both parties — Harris v. Harris, Cal., 69 Pac. Rep. 23.

190. WITNESSES—Cross-Examination.—In prosecution for rape, it was error to compel the defendant to testify on cross-examination to acts of intercourse with the prosecutrix, not mentioned in direct examination.—People v. Keith, Cal., 68 Pac. Rep. 816.

191. WITNESSES—Reputation.—Question asked a witness, whether he knew a third party's reputation for honesty and fair dealing, was not objectionable as not so framed as to find out first whether witness knew the party's reputation.—Salvini v. Legumazabel, Tex., 68 S. W. Rep. 183.

192. WITNESSES—Statements to Physician.—Statement to a surgeon as to how an accident happened held not privileged, in absence of evidence that the statement was necessary to enable him to act as a physician — Green v. Metropolitan St. Ry. Co., N Y., 63 N. E. Rep. 958.

193. WITNESSES—Testimony of Trustee.—The interest of a trustee is not hostile, so as to make him incompetent, after death of the grantor in the deed of trust, to give testimony to sustain it. — Kraft v. Neuffer, Pa., 52 Atl. Rep. 100.

194. WITNESSES — Transaction With Person Since Deceased.—Where a father, since deceased, executed at one time separate deeds to his wife and several sons, each of the grantees was a competent witness to establish the delivery of the deeds to the other grantees.—Nichols v. King, Ky., 68 S. W. Rep. 133.

195. WORK AND LABOR—Services by Sister. — In an action by a sister against her brother for services as his housekeeper, an instruction that, unless defendant knew that plaintiff expected pay, etc., no recovery could be had, held erroneous.—Spencer v. Spencer, Mass., 63 N. E. Rep. 947.